

# 14-2854-CV

---

IN THE  
**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

---

JAMES CASTELLUCCIO,

*Plaintiff-Appellee,*

—against—

INTERNATIONAL BUSINESS MACHINES CORPORATION (IBM),

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

---

**JOINT APPENDIX**  
**VOLUME III OF VI**  
**(Pages A-560 to A-854)**

---

ZACHARY D. FASMAN, ESQ.  
PROSKAUER ROSE LLP  
Eleven Times Square  
New York, New York 10036  
(212) 969-3440

TRACI L. LOVITT, ESQ.  
JONES DAY  
100 High Street  
Boston, Massachusetts 02110  
(617) 960-3939

WILLIS J. GOLDSMITH, ESQ.  
JONES DAY  
222 East 41st Street  
New York, New York 10017  
(212) 326-3939

*Attorneys for Defendant-Appellant IBM*

*(Counsel continued on inside cover)*

---

MARK RAYMOND CARTA, ESQ.  
MARGARET ANN TRIOLO, ESQ.  
CARTA, MCALISTER  
& MOORE, LLC  
1120 Boston Post Road  
Darien, Connecticut 06820  
(203) 202-3103

*Attorneys for Plaintiff-Appellee  
James Castelluccio*

## TABLE OF CONTENTS

PAGE

### Volume I of VI

<i>Castelluccio v. International Business Machines Corp.</i> , Case No. 09-cv-1145 (TPS) (D. Conn.) Docket Sheet .....	A-1
Complaint, dated July 20, 2009 (Docket No. 1) .....	A-33
Affirmation of Zachary D. Fasman in Support of IBM's Motion for Summary Judgment, dated September 20, 2010 (Docket No. 47-1) .....	A-53
Exhibit 4 to the Affirmation of Zachary D. Fasman — Excerpts from the Deposition of Joanne Collins-Smee (Docket No. 47-5) .....	A-56
IBM's Memorandum of Law in Support of its Motion for Summary Judgment, dated September 20, 2010 (Docket No. 49) .....	A-107
IBM's Memorandum of Law in Support of Motion to File Confidential Documents Under Seal, dated September 20, 2010 (Docket No. 53) .....	A-154
Plaintiff's Memorandum of Law in Support of Opposition to Defendant's Motion for Summary Judgment, dated November 15, 2010 (Docket No. 70) .....	A-160
Memorandum of Decision and Order denying Defendant's Motion for Summary Judgment, dated August 21, 2012 (Docket. No. 108) .....	A-213
Parties' Joint Trial Memorandum, dated September 13, 2013 (Docket No. 133) .....	A-229
Exhibit C to Affirmation of Mark R. Carta in Support of Castelluccio's Motion to Preclude, dated November 22, 2013 — Open Door Report (Docket No. 156-3) .....	A-250

	PAGE
Exhibit G to Affirmation of Mark R. Carta in Support of Castelluccio's Motion to Preclude, dated November 22, 2013 — Email from R. Mandel to K. Holmes dated June 20, 2008 (Docket No. 156-7) .....	A-255
Ruling on Plaintiff's Motion to Preclude Evidence, dated December 23, 2013 (Docket No. 163) .....	A-258
Defendant's Memorandum of Law in Support of its Motion for Judgment as a Matter of Law, dated January 17, 2014, with Exhibit (Docket No. 179) .....	A-265

### Volume II of VI

Transcript of Trial, dated January 13, 2014 (Docket No. 175).....	A-277
Transcript of Trial, dated January 14, 2014 (Docket No. 176).....	A-330
Transcript of Trial, dated January 15, 2014 (Docket No. 177).....	A-388
Transcript of Trial, dated January 16, 2014 (Docket No. 178).....	A-444
Transcript of Trial, dated January 17, 2014 (Docket No. 182).....	A-507

### Volume III of VI

Transcript of Trial, dated January 21, 2014 (Docket No. 183).....	A-560
Transcript of Trial, dated January 22, 2014 (Docket No. 184).....	A-603
Transcript of Trial, dated January 23, 2014 (Docket No. 185).....	A-658
Transcript of Trial, dated January 24, 2014 (Docket No. 186).....	A-710
Plaintiff's Trial Exhibit 1— The IBM Personal Business Commitments Program, dated February 17, 2004 .....	A-720

	PAGE
Plaintiff's Trial Exhibit 4—	
Castelluccio's Personal Business Commitment, Assessment	
Period: 1/1/2007 to 12/31/2007 .....	A-733
Plaintiff's Trial Exhibit 14—	
Castelluccio's Personal Business Commitment, Assessment	
Period: 1/1/2006 to 12/19/2006 .....	A-734
Plaintiff's Trial Exhibit 16—	
WellPoint Contract Overview, Bob Zapfel Review,	
dated June 2, 2006 .....	A-739
Plaintiff's Trial Exhibit 17—	
WellPoint Red Team Review, dated June 21, 2006 .....	A-789
Plaintiff's Trial Exhibit 29—	
Email dated February 28, 2007 from J. Collins-Smee to K.	
Holmes Re: Need to Replace J. Castelluccio .....	A-834
Plaintiff's Trial Exhibit 31—	
P. Kerine Five Minute Drill Summary .....	A-835
Plaintiff's Trial Exhibit 53—	
Email dated April 27, 2007 from D. Liederbach to	
J. Collins-Smee Re: Miguel .....	A-844
Plaintiff's Trial Exhibit 56—	
J. Collins-Smee Five Minute Drill Summary .....	A-846
Plaintiff's Trial Exhibit 60—	
Email dated August 9, 2007 from M. Boxer to R. Zapfel,	
M. Lautenbach and S. Mills Re: Production Issue .....	A-852
Plaintiff's Trial Exhibit 62—	
Email dated August 22, 2007 from K. McDonald to M. Boxer .....	A-853

	PAGE
Plaintiff's Trial Exhibit 64—	
Email dated September 8, 2007 from K. McDonald to M. Boxer	
Re: DPE .....	A-854

### Volume IV of VI

Plaintiff's Trial Exhibit 66—	
R. Zapfel's Five Minute Drill Summary .....	A-855
Plaintiff's Trial Exhibit 67—	
WellPoint Executive Operating Committee Meeting Report –	
Fourth Quarter Review .....	A-861
Plaintiff's Trial Exhibit 68—	
WellPoint Client Satisfaction Survey, dated February 14, 2008 .....	A-865
Plaintiff's Trial Exhibit 69—	
Meeting Notice dated January 10, 2008 to A. Weststeyn	
Re: J. Castelluccio Career Opportunities .....	A-870
Plaintiff's Trial Exhibit 70—	
Email dated January 14, 2008 from J. Castelluccio to	
A. Weststeyn Re: Our phone conversation .....	A-871
Plaintiff's Trial Exhibit 71—	
Email dated May 1, 2008 from A. Weststeyn to J. Castelluccio	
Re: Job Opportunities .....	A-872
Plaintiff's Trial Exhibit 72—	
Email dated May 4, 2008 from J. Castelluccio to A. Weststeyn	
Re: Job Search .....	A-873
Plaintiff's Trial Exhibit 73—	
Email dated January 18, 2008 from J. Castelluccio to	
G. Mastriforte Re: UK's DVLA Sr. PE Opportunity .....	A-875

	PAGE
Plaintiff's Trial Exhibit 74—	
Email dated March 28, 2008 from J. Castelluccio to	
G. Mastriforte Re: Sr. PE Opportunities.....	A-877
Plaintiff's Trial Exhibit 75—	
Meeting Notice dated January 9, 2008 to J. Castelluccio	
Re: Personal Phil Guido.....	A-878
Plaintiff's Trial Exhibit 76—	
Email dated February 27, 2008 from Castelluccio to G. Walker	
Re: Personal and Confidential .....	A-879
Plaintiff's Trial Exhibit 78—	
Email dated April 7, 2008 from J. Castelluccio to	
M. Barnett Re: Your call .....	A-880
Plaintiff's Trial Exhibit 79—	
Email dated April 14, 2008 from M. Barnett to J. Castelluccio	
Re: Our Discussion Yesterday .....	A-881
Plaintiff's Trial Exhibit 80—	
Email dated April 23, 2008 from J. Castelluccio to B. Barnett	
Re: For our discussion .....	A-882
Plaintiff's Trial Exhibit 81—	
Email dated May 20, 2008 from B. Barnett to J. Castelluccio	
Re: Network Position .....	A-884
Plaintiff's Trial Exhibit 82—	
Email dated May 9, 2008 from C. Murphy to G. Walker	
Re: Actions/Notes from May 7 Five Minute Drill.....	A-885
Plaintiff's Trial Exhibit 83—	
Email dated May 13, 2008 from M. Echavarria to ME Directs,	
forwarding J. Collins-Smee email Re: Organizational changes.....	A-888

	PAGE
Plaintiff's Trial Exhibit 88—	
Email dated May 13, 2008 from J. Castelluccio to J. Overacre	
Re: Attached is my resume .....	A-890
Plaintiff's Trial Exhibit 90—	
Email dated May 21, 2008 from J. Collins-Smee to	
J. Castelluccio Re: Resume.....	A-891
Plaintiff's Trial Exhibit 91—	
Email dated May 20, 2008 from J. Collins-Smee to	
J. Castelluccio Re: Resume.....	A-893
Plaintiff's Trial Exhibit 92—	
Email dated May 30, 2008 from K. Holmes to J. Collins-Smee	
Re: J. Castelluccio – Executive Separation Talking Points .....	A-895
Plaintiff's Trial Exhibit 93—	
Email dated June 10, 2008 from J. Castelluccio to R. Atkins	
Re: Our phone conversation of a week ago .....	A-897
Plaintiff's Trial Exhibit 99—	
Letter dated April 15, 2009 from J. White to M. King	
Re: Castelluccio NYSDHR/EEOC Charge.....	A-898
Plaintiff's Trial Exhibit 204—	
Report of Parties 26(F) Planning Conference,	
dated October 5, 2009 (Docket No. 18) .....	A-905
Plaintiff's Trial Exhibit 259—	
Plaintiff's Demonstrative Exhibit – IBM's Reasons for	
Termination .....	A-928
Defendant's Trial Exhibit 12—	
Email chain dated April 25, 2006 from D. Liederbach to K. Jones	
Re: WLP Resource Action .....	A-929



	PAGE
Defendant's Trial Exhibit 13—	
Email dated May 9, 2006 from D. Liederbach to K. Jones Re:	
Personal and Confidential .....	A-931
Defendant's Trial Exhibit 28—	
Email chain dated January 26, 2007 from J. Collins-Smee to D.	
Liederbach cc: C. Adler; L. Serra Re: Wellpoint Labor	
Investments .....	A-932
Defendant's Trial Exhibit 29—	
Email chain dated September 20, 2006 from D. Liederbach to J.	
Collins-Smee Re: Service Delivery at WellPoint – Urgent .....	A-937
Defendant's Trial Exhibit 32—	
Email chain dated February 16, 2007 from J. Collins-Smee to K.	
McDonald Re: my barrage of emails .....	A-942
Defendant's Trial Exhibit 34—	
Email chain dated February 18, 2007 from D. Liederbach to J.	
Collins-Smee cc: C. Adler Re: Request for Meeting .....	A-943
Defendant's Trial Exhibit 36—	
Email dated February 28, 2007 from J. Collins-Smee to	
K. Holmes .....	A-946
Defendant's Trial Exhibit 45—	
Email chain dated March 31, 2007 from J. Collins-Smee to D.	
Liederbach; J. Castelluccio Re: Wellpoint – Monday .....	A-947
Defendant's Trial Exhibit 48—	
Email chain dated May 4, 2007 M. Boxer to K. McDonald .....	A-948
Defendant's Trial Exhibit 52—	
Email chain dated May 15, 2007 from K. McDonald to J. Collins-	
Smee cc: D. Liederbach; E. McCabe; J. Shimkus; R. Zapfel Re:	
Delivery Leadership .....	A-950

	PAGE
Defendant's Trial Exhibit 54—	
Email chain dated May 22, 2007 from M. Boxer to K. McDonald...	A-952
Defendant's Trial Exhibit 109—	
IBM's U.S. Concerns and Appeals Program (Open Door, Panel Review & Confidentially Speaking).....	A-954
Defendant's Trial Exhibit 117—	
Email dated May 30, 2008 from K. Holmes to J. Collins-Smee Re: J. Castelluccio Executive Separation Talking Points .....	A-965
Defendant's Trial Exhibit 124—	
Email chain dated May 14, 2008 from R. Mandel to K. Moran Re: Dir Global Interlock Process – Actions Pending for Daniels approval .....	A-967
Defendant's Trial Exhibit 128—	
Email chain dated April 1, 2008 from R. Mandel to K. Moran Re: Candidate for Network Services Integration Position, with attachment .....	A-971
Defendant's Trial Exhibit 135—	
Email chain dated May 20, 2008 from G. Walker to R. Mandel Re: JG Castelluccio Resume.....	A-976
Defendant's Trial Exhibit 136—	
Email chain dated May 20, 2008 from G. Walker to R. Mandel Re: JG Castelluccio Resume.....	A-979
Court Exhibit 1—	
Jury Instruction Regarding Positions Open while Castelluccio on the Bench .....	A-981
Court Exhibit 2—	
Letter from Jury .....	A-982
IBM's Marked Witness List, dated January 24, 2014 (Docket No. 188) .....	A-984

	PAGE
Castelluccio's Marked Witness List, dated January 24, 2014 (Docket No. 189) .....	A-985
Court Exhibit List, dated January 24, 2014 (Docket No. 190) .....	A-986
Charge to the Jury, dated January 24, 2014 (Docket No. 194) .....	A-987
Judgment entered in favor of James Castelluccio against IBM, dated January 28, 2014 (Docket No. 195) .....	A-1004

### Volume V of VI

Affidavit of Mark R. Carta in Support of Plaintiff's Motion for Attorneys' Fees, Prejudgment Interest, Costs and Compensation for Increased Tax Liability, dated February 11, 2014 (Docket. No. 199) .....	A-1005
Exhibit 4 to Affidavit of Mark R. Carta— Carta, McAlister & Moore LLC Invoice, dated April 2, 2012 (Docket. No. 199-4) .....	A-1031
Exhibit 3 to Affidavit of Mark R. Carta— Rucci, Burnham & Carta, LLP Invoice, dated August 29, 2008 (Docket. No. 199-10) .....	A-1102
Exhibit 4 to Affidavit of Mark R. Carta— Carta, McAlister & Moore LLC Invoice, dated April 2, 2012 (Docket. No. 199-11) .....	A-1201

### Volume VI of VI

Defendant's Renewed Motion for Judgment as Matter of Law, or, in the Alternative, for New Trial/Remittiture, dated February 25, 2014 (Docket No. 202) .....	A-1272
Declaration of Zachary D. Fasman, dated April 3, 2014 (Docket. No. 223) .....	A-1325

x

	PAGE
Exhibit 6 to Declaration of Zachary D. Fasman— IBM designations of time entries regarding Summary Judgment (Docket No. 223-6) .....	A-1334
Exhibit 8 to Declaration of Zachary D. Fasman— IBM designations of time entries regarding Trial Preparation (Docket No. 223-8) .....	A-1341
Plaintiff’s Reply to IBM’s Opposition to Plaintiff’s Motion for Attorneys’ Fees, dated April 17, 2014 (Docket No. 229) .....	A-1366
Affidavit of Mark R. Carta in Support of Plaintiff’s Supplemental Motion for Attorneys’ Fees, dated June 2, 2014 (Docket. No. 232) .....	A-1390
Declaration of Zachary D. Fasman, dated June 23, 2014, with Exhibit A (Docket. No. 235) .....	A-1395
Opinion and Order, dated July 23, 2014, denying Motion for Judgment as a Matter of Law, denying Oral Motion for Judgment as a Matter of Law, denying Renewed Motion for Judgment as a Matter of Law, and denying Motion for New Trial or Remittitur (Docket No. 236) .....	A-1414
Ruling on Plaintiff’s Motion for Attorneys’ Fees, dated July 23, 2014 (Docket No. 237) .....	A-1449
Final Judgment entered in favor of James Castelluccio against IBM, dated July 28, 2014 (Docket No. 240) .....	A-1472
IBM’s Notice of Appeal, dated August 11, 2014 (Docket No. 241) .....	A-1473

Page 1121

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

JAMES CASTELLUCCIO )  
Plaintiff ) 3:09-cv-01145 (TPS)  
)  
VS ) January 21, 2014  
INTERNATIONAL BUSINESS )  
MACHINES CORPORATION ) Federal Building  
Defendant ) Hartford, Connecticut

VOLUME 6  
TRIAL HELD BEFORE  
THE HONORABLE THOMAS P. SMITH, U.S.M.J.

Reporter: WENDY J. ALLEN, RPR, CRR, LSR #00221

Page 1123

I N D E X

WITNESSES:	PAGE:
Gary Crakes	
Direct Examination by Mr. Carta.....	1129
Cross-Examination by Mr. Fasman.....	1141
Redirect Examination by Mr. Carta.....	1160
Recross Examination by Mr. Fasman.....	1162
Dave Liederbach	
Direct Examination by Mr. Duffield.....	1165
Cross-Examination by Mr. Carta.....	1194
Redirect Examination by Mr. Duffield.....	1231
Keenie McDonald	
Direct Examination by Mr. Duffield.....	1237
Cross-Examination by Mr. Carta.....	1260

Page 1122

Representing the Plaintiff  
Carta McAlister & Moore, P.C.  
1120 Boston Post Road  
Post Office Box 83  
Darien, CT 06820  
By: Mark R. Carta, Esq.  
mark@cmm-law.com  
By: Margaret A. Triolo, Esq.  
margaret@cmm-law.com  
By: Troy Bailey, Esq.

Representing the Defendant  
Paul Hastings, LLP  
75 East 55th Street  
New York, NY 10022  
By: Zachary Fasman, Esq.  
Zacharyfasman@paulhastings.com  
By: Todd C. Duffield, Esq.  
Toddduffield@paulhastings.com  
By: Jean-Marie Gutierrez

ALSO PRESENT:

Daniel Fox, Esq.  
IBM in-house counsel

Page 1124

THE COURT: We're going to have some snow today, I understand. Anybody have any instant up-to-the-minute weather reports? I hear it's supposed to start in the afternoon and by 5 o'clock it's supposed to be pretty bad, during the commuting hour, so I think we're probably well advised to see how bad it gets today and be prepared if we have to let the jury go. One of the district judges, I guess it would be Judge Hall, one of the district judges closes the courtroom or the courthouse, then we can't be sitting here.

So, Mr. Carta, my recollection is that we finished with Kelton Jones last time.

MR. CARTA: Yes.

THE COURT: And are you going to call any more witnesses?

MR. CARTA: Yes, Your Honor. I'd like to call my economist, Dr. Gary Crakes, as my final witness.

THE COURT: Okay.

MR. CARTA: Your Honor, I do have one motion to make as well. And it's a motion for sequestration. And I would note that when Mr. Castelluccio testified none of my other witnesses were in the courtroom. Also when Mr. Morin testified none

<p style="text-align: right;">Page 1125</p> <p>1 of the witnesses were here, and at the time that  2 Kelton Jones testified, Mr. Morin was not here as  3 well. So I think it's consistent with what we've  4 done.</p> <p>5 I will admit that there was a brief  6 conversation between Mr. Fasman and I in the beginning  7 about whether we were going to have such an order in  8 place. In my mind it was kind of left open. But in  9 any event, I at this point would like it, because as I  10 prepared my cross-examinations for his various  11 witnesses it became apparent to me that there were  12 going to be instances where there was an issue in my  13 mind about what their testimony -- it would be  14 inconsistent, and I think that's a Rule 615.</p> <p>15 THE COURT: Yes.</p> <p>16 MR. FASMAN: Your Honor, I'm well aware  17 of the rule. Mr. Carta and I discussed it at the  18 start of this case. He objected. I said I did want  19 to sequester all witnesses, he objected to it, and I  20 said I don't care. If you want the witnesses in,  21 that's fine with me. It was not left open. I did not  22 make that motion. And you saw Mr. Morin sit in  23 chambers when Ms. Collins-Smee testified, Kelton Jones  24 while Ms. Collins-Smee testified, she was called as  25 his witness, and this was not invoked previously.</p>	<p style="text-align: right;">Page 1127</p> <p>1 MR. CARTA: Your Honor, I don't disagree  2 with that. I think that that's an accurate  3 representation. I think I said I haven't given it any  4 thought, let me think about it, I guess I'm opposed to  5 it. I don't believe I entered into any agreement.  6 I'm confident I didn't enter into any agreement. I do  7 remember Mr. Fasman saying something to the effect,  8 okay, well, I'm not going to press the issue. I do  9 recall that.</p> <p>10 MR. FASMAN: And if he was opposed to it,  11 he said, I'm opposed to it, and that's why I didn't do  12 it, Judge.</p> <p>13 THE COURT: It seems to me that enough  14 was said between you gentlemen for a reasonable  15 fact-finder to find that you, Mr. Fasman, believed  16 that the issue had been resolved as you had  17 represented it, and we proceeded in that way during  18 this trial up to this point. So I think this is a  19 good faith misunderstanding, and in order to keep it a  20 good faith misunderstanding I'm not going to sequester  21 anybody.</p> <p>22 MR. FASMAN: Thank you, Your Honor.  23 THE COURT: All right.  24 MR. CARTA: So I'm ready, Your Honor.  25 THE COURT: Yes, sir.</p>
<p style="text-align: right;">Page 1126</p> <p>1 I understand the rule, I know what the  2 rule is, and I know when it can be invoked, but  3 frankly, I think it is improper to do this kind of  4 stuff. In more than 40 years of trying cases I've  5 never had counsel on the other side say this, where we  6 agreed that we wouldn't sequester and then turn around  7 at the start of my case and sequester witnesses. It's  8 at least bad form. I'm not going to go any further.</p> <p>9 MR. CARTA: Your Honor, it's simply not  10 true that we agreed. Counsel raised the issue with me  11 and I said I really hadn't thought about it, and  12 that's how I recall it being left.</p> <p>13 MR. FASMAN: No, you opposed it. You  14 said, I'm opposed to it, and I said, okay, fine.</p> <p>15 THE COURT: Okay. If you had agreed with  16 Mr. Fasman that there would be sequestration, I would  17 deny your request in keeping with your agreement. You  18 say there was no agreement, he says there was an  19 agreement. So that really helps me a lot.</p> <p>20 MR. FASMAN: Well, Judge, I can only tell  21 you -- you can put me under oath if you want, but I  22 will tell you that as an officer of the court, I said  23 it to Mr. Carta. I said, Mr. Carta, sequestration?  24 And he said, I'm opposed to it. I said, fine, I'm not  25 going to move for it. That's exactly what happened.</p>	<p style="text-align: right;">Page 1128</p> <p>1 (Jurors present)  2 THE COURT: Good morning, ladies and  3 gentlemen. Please be seated. I hope you had a nice  4 weekend</p> <p>5 THE JURORS: Very nice.</p> <p>6 THE COURT: Now, it seems that the  7 weatherman is telling us that we might have a  8 snowstorm and it might come crashing down on us  9 beginning this afternoon and make it very, very  10 difficult at commuting time, and there's one thing  11 nobody in this courtroom wants is for you, for any of  12 us, to injure ourselves or get into an automobile  13 accident, possibly injure somebody else, at the very  14 least have a huge deductible getting your car fixed.</p> <p>15 So I'm going to keep my ear to the  16 ground, and Michael and Jacob will be doing the same  17 thing, and if it starts getting bad, it looks like  18 it's going to build up, I would rather let you go and  19 have a situation where the snowstorm is not as bad as  20 we thought it was than to keep you here and then, you  21 know, find out it's the great blizzard of 2014, we  22 have to get dogs and dog sleds. Because nobody wants  23 that.</p> <p>24 So I'm glad you had a good weekend.  25 Everyone's here, everyone is here who needs to be</p>

<p style="text-align: right;">Page 1129</p> <p>1 here, and Mr. Carta is going to call his first 2 witness. 3 Let me tell you that while you were 4 waiting here, we resolved four questions of law that I 5 think are just going to streamline the case. 6 So Mr. Carta, good morning, sir, and take 7 it away. 8 MR. CARTA: Thank you, Your Honor. With 9 the Court's permission I'd like to call Dr. Gary 10 Crakes to the stand. 11 (Gary Crakes, sworn by the clerk) 12 THE CLERK: Please state your name, spell 13 your last name for the record. 14 THE WITNESS: Gary Crakes, C-R-A-K-E-S. 15 THE CLERK: Your business address? 16 THE WITNESS: 860 Ward Lane, Cheshire 17 Connecticut, 06410. 18 19 DIRECT EXAMINATION BY MR. CARTA: 20 21 Q Good morning, Dr. Crakes. 22 A Good morning. 23 Q What is your present position? 24 A I'm a professor emeritus of economics at 25 Southern Connecticut State University in New Haven.</p>	<p style="text-align: right;">Page 1131</p> <p>1 A Yes, I have. 2 Q And what are they? 3 A I received a University of Connecticut 4 predoctoral fellowship to provide financial support 5 for your first year of doctoral studies, University of 6 Connecticut dissertation fellowship to provide support 7 for any doctoral dissertation research, and a national 8 competition, a Richard D. Erwin fellowship also to 9 provide support for research. 10 Q What awards, if any, have you received in 11 connection with your teaching? 12 A I received the University's teacher of the 13 year award in 1987, and school of business teacher 14 award in 1998. 15 Q What honors, if any, have you received for 16 your services as an economic expert? 17 A I was honored for pro bono volunteer 18 appraisals of economic loss that I performed on behalf 19 of families of the victims of the terrorist attack on 20 the World Trade Center through the Victims 21 Compensation Fund run by the U.S. Department of 22 Justice. 23 Q Are you a member of any relevant professional 24 organizations? 25 A Yes.</p>
<p style="text-align: right;">Page 1130</p> <p>1 Q Are you also a principal in a consulting firm 2 known as Maher and Crakes? 3 A Maher, Crakes and Associates, yes. 4 Q And in what business does Maher Crakes engage? 5 A Performing appraisals of economic loss for 6 matters in litigation. 7 Q And for how long have you been a professor at 8 Southington University? 9 A I began my work at Southern Connecticut on a 10 full-time basis in 1980 as an assistant professor, 11 1985 became associate professor, 1989 full professor, 12 and professor emeritus in 2011. 13 Q What are your present duties in that capacity? 14 A At the present time I continue to teach on a 15 part-time basis, teaching one large lecture hall class 16 in the principles of macroeconomics. 17 Q Professor Crakes, would you describe just 18 generally for the jurors your educational background? 19 A Yes. I received a bachelor's degree in 20 economics from Central Connecticut State College in 21 1975, a master's degree in economics from University 22 of Connecticut in 1976, and a Ph.D. in economics from 23 the University of Connecticut in 1984. 24 Q Have you received any fellowships for your 25 studies and research?</p>	<p style="text-align: right;">Page 1132</p> <p>1 Q Would you name a few of them, please? 2 A I'm a member of the American Economic 3 Association, the Eastern Economic Association, the 4 National Association of Business Economics, the 5 National Association of Forensic Economics, the 6 American Academy of Economic and Financial Experts, 7 and an international honor society in economics, 8 Omicron Delta Epsilon. 9 MR. FASMAN: For the record, Your Honor, 10 we're not challenging Dr. Crakes' credentials to 11 testify as an expert. 12 THE COURT: Is it stipulated that he is 13 indeed an expert? 14 MR. FASMAN: In his field, yes. 15 THE COURT: In his field. Okay, thank 16 you. 17 BY MR. CARTA: 18 Q Let me just ask one final preliminary 19 question, then. Dr. Crakes, have you testified in 20 courts concerning economic loss in employment cases 21 previously? 22 A Yes, I have. 23 Q And what courts? 24 A Federal and state courts in Connecticut, and 25 New York.</p>



<p style="text-align: right;">Page 1133</p> <p>1 Q Did I ask you to prepare an appraisal of the 2 economic loss suffered by James Castelluccio as a 3 result of IBM's age discrimination? 4 A Yes. 5 Q And did you perform such an analysis? 6 A Yes, I did. 7 Q And do you have an opinion of probable 8 economic loss sustained by Mr. Castelluccio? 9 A Yes. 10 Q Would you spend a few minutes and explain to 11 the jury how you arrived at that opinion, starting 12 with the sources of the data that you reviewed? 13 A Yes. I reviewed information concerning the 14 income tax returns of Mr. Castelluccio, as well as the 15 personnel records from IBM, particularly associated 16 with his levels and forms of compensation for years 17 prior to his termination from that employment. 18 Q And generally in doing your analysis did you 19 make a number of assumptions? 20 A Yes, I did. 21 Q And what were those assumptions specifically? 22 A I calculated the economic loss for Mr. 23 Castelluccio from the day of his termination of July 24 1st, 2008, to March 2nd of 2013, a period of 4.67 25 years. The components of economic loss that I</p>	<p style="text-align: right;">Page 1135</p> <p>1 years was \$220,261. 2 Q And did you also take into consideration IBM's 3 401(k) contribution that it had previously made on his 4 behalf? 5 A Yes. 6 Q And how did you work that into your analyses? 7 A My understanding was that the employer's 8 contribution to the 401(k) plan was equal to 10 9 percent of salary and incentive compensation, so I 10 added the salary incentive compensation together, 11 multiplied that by 10 percent, and arrived at a value 12 for the employer's contribution to the 401(k) over 13 that 4.67 year period of \$117,294. 14 Q And how did you calculate the economic loss 15 associated with his health benefits? Go through that 16 slowly so it's easy to follow, please. 17 A The health benefit value was based upon what 18 Mr. Castelluccio was contributing for his health 19 insurance at the time of his termination from IBM, and 20 the difference between that value and what he then had 21 to contribute on his own behalf to maintain health 22 insurance subsequent to the termination of his 23 employment. I took the difference between those 24 values and again applied it for the 4.67 years in the 25 past, and arrived at a value for the loss of health</p>
<p style="text-align: right;">Page 1134</p> <p>1 included in my analysis were his loss of salary, his 2 loss of incentive compensation, his loss of the 3 employer's contribution to the 401(k) plan, and his 4 loss of health benefits. 5 Q And let's go through those various components. 6 How did you calculate his lost salary? 7 A The loss of his salary was based upon his 8 annual salary at the time of his termination of 9 \$204,000 per year. I applied that to the 4.6 years to 10 March 2nd of 2013 with no additional increases, just 11 by multiplying that \$204,000 over that period of time, 12 and arrived at a loss of salary for Mr. Castelluccio 13 of \$952,680. 14 Q And how did you calculate his incentive 15 compensation, the loss of his incentive compensation? 16 A His incentive compensation varied from year to 17 year. His salary increased from year to year, but the 18 incentive comp varied, so I felt it was reasonable to 19 consider over the last four years of his employment, 20 full years of employment with IBM his average annual 21 incentive compensation. That average annual value was 22 \$47,165 over that four-year period, and I again 23 applied it for the 4.67 years to the point of March 24 2nd of 2013 from the date of his termination, and the 25 value of that incentive compensation over that 4.67</p>	<p style="text-align: right;">Page 1136</p> <p>1 benefits of \$54,807. 2 Q Now, you've referred several times about using 3 a time period of 4.67 years. Can you just explain how 4 you arrived at that number? 5 A Yes. The 4.67 years is from the date of 6 termination of June 30th, 2008, to the point where Mr. 7 Castelluccio would be 66 years of age, which would be 8 March 2nd of 2013. So the entire loss in this matter 9 is in the past now since of course we have gone beyond 10 March 2nd of 2013. 11 The value for escalating his loss of earnings, 12 his economic loss for that 4.67 year period, to age 66 13 is based upon what I understood Mr. Castelluccio's 14 intentions and recognized that by reviewing -- I 15 recognized that by reviewing tables on work life 16 expectancy for a man of his age at the time of his 17 termination and years to final separation from the 18 labor force, that those values would be somewhere 19 between ages 68 and 69, therefore I felt it was 20 reasonable to calculate his economic loss to age 66 or 21 to March 2nd of 2013. 22 Q So you didn't actually use the estimates 23 contained in the standard charts which would have said 24 68? 25 A Between age of 68 and 69. No, I did not. But</p>



<p style="text-align: right;">Page 1137</p> <p>1 I did review those as being supportive of the 2 calculation that I was making. 3 Q You used the date of March 2013? 4 A March 2nd of 2013, yes. 5 Q In your analysis, what assumptions, if any, 6 did you make with respect to Mr. Castelluccio's future 7 receipt of stock options or restricted stock units? 8 MR. FASMAN: I'm going to object to that, 9 Your Honor. This witness has been held to be 10 incompetent to testify about stock options. He did 11 not make an appropriate investigation. We've had a 12 Daubert ruling on this, and this witness cannot 13 testify to that. I'm going to object to any testimony 14 about stock options. 15 THE COURT: Mr. Carta? 16 MR. CARTA: Your Honor, the ruling was 17 that he could testify to the value. The testimony is 18 that he didn't take any stock options or restricted 19 stock units into consideration. They're not part of 20 his analysis. 21 THE COURT: Well, I guess we don't have 22 anything to complain about. I would sustain Mr. 23 Fasman's objection, but you can ask the question 24 anyway. The answer's going to be no. 25 BY MR. CARTA:</p>	<p style="text-align: right;">Page 1139</p> <p>1 by taking that annual loss and multiplying it by the 2 4.67 years, is that right? 3 A Yes. 4 Q Does your calculation take into consideration 5 the tax impact of Mr. Castelluccio recovering this sum 6 of money all in one year? 7 A No. 8 Q You didn't do any discount for that? 9 A I did not add any value for that additional 10 tax liability, no, I did not. 11 Q In your calculation of Mr. Castelluccio's 12 economic loss, did you deduct monies that he received 13 from his pension? 14 A No. 15 Q Why not? 16 A The calculation of economic loss is based upon 17 the loss to Mr. Castelluccio subsequent to his 18 termination. Any pension benefits that he has 19 received from that point of termination would be based 20 upon his employment and efforts prior to that 21 termination itself. So I do not subtract any value 22 for pension benefits associated with the work that he 23 had performed up to the point of his termination. 24 Q In earlier estimates that you had done in this 25 case, how had you treated the pension deduction?</p>
<p style="text-align: right;">Page 1138</p> <p>1 Q You didn't incorporate -- in doing your 2 analysis you didn't add to the economic loss anything 3 associated with stock options, isn't that right? 4 A That's correct. 5 Q Based upon the materials that you used and 6 reviewed in your conversations with Mr. Castelluccio 7 as well as your professional expertise, what in your 8 opinion is the total economic loss sustained by Mr. 9 Castelluccio as a result of his termination by IBM in 10 June of 2008? 11 A The total economic loss for the period of time 12 from his termination to age 66, March 2nd, 2013, is 13 \$1,345,042. 14 Q And how -- when you made that calculation, is 15 there a difference -- is there a difference between 16 the loss in any particular year? 17 A No. 18 Q So the loss that you have calculated is 19 actually the same for each of the 4.67 years? 20 A Yes, it is. 21 Q And did you do a calculation as to how much 22 the annual loss was for Mr. Castelluccio? 23 A For all four components, the annual loss is 24 approximately \$288,000. 25 Q And the total economic loss can be calculated</p>	<p style="text-align: right;">Page 1140</p> <p>1 A At one point there was one analysis I 2 performed where I did subtract the pension benefit. 3 Q And were there other analyses where you did 4 not? 5 A Yes. 6 Q Have you charged Mr. Castelluccio for your 7 time in performing your analysis? 8 A Yes, I did. 9 Q And what is your -- what was your fee for this 10 time? 11 A The fee for the initial -- for my time 12 associated with the initial appraisal of economic loss 13 was \$3,200. I then made a set of revised calculations 14 for which there was an additional charge for my time 15 of \$1,700. 16 Q So the total of that was \$4,900, is that 17 correct? 18 A That's correct. 19 Q And are you also charging for your time to 20 testify here in court today? 21 A Yes. 22 Q And what is your fee for that time? 23 A The fee for my time associated with appearance 24 for testimony at trial is \$1,100. 25 Q And the fee that you previously had charged,</p>

<p style="text-align: right;">Page 1141</p> <p>1 the \$4,900, has Mr. Castelluccio paid you that sum in  2 full?  3 A Yes.  4 Q So the total fee is \$6,000, is that correct,  5 for your time?  6 A Yes.  7 MR. CARTA: I have no further questions.  8 Thank you, Dr. Crakes.  9 THE WITNESS: Thank you.  10 MR. FASMAN: Good morning, ladies and  11 gentlemen.  12  13 CROSS-EXAMINATION BY MR. FASMAN:  14  15 Q Just Dr. Crakes, Dr. Crakes, Professor?  16 A I'll answer to just about anything.  17 Q There you go.  18 Dr. Crakes, in your direct testimony you  19 mentioned that you had relied on certain assumptions  20 in creating the document that we saw, correct?  21 A Yes.  22 Q And if the assumptions are not valid -- you  23 would agree with me that if your expert opinion relies  24 on assumptions and the assumptions are not valid, then  25 your expert opinion is not valid?</p>	<p style="text-align: right;">Page 1143</p> <p>1 Q And you made no independent inquiry into Mr.  2 Castelluccio's job performance, isn't that right?  3 A That's correct.  4 Q And you have no idea how IBM actually  5 determines bonus or incentive compensation, do you?  6 A No, I do not.  7 Q And you have no idea of IBM's contributions to  8 401(k) plans aside from what you found in Mr.  9 Castelluccio's records, right?  10 A That's correct.  11 Q And so if IBM wages or incentive payments were  12 frozen at any point during the period from 2008 until  13 now, you wouldn't know that?  14 A I wouldn't know that, but it would be  15 consistent with my analysis because my analysis is  16 based on applying those constant values over that 4.6  17 year period.  18 Q Now, on the stock option question, I just want  19 to go back to it for a minute, you were held by the  20 Court -- isn't this accurate, you were held by the  21 Court to have not made a sufficient investigation in  22 order to allow you to testify about options, correct?  23 A I'm not making any assessment of the Court's  24 decision. What I am aware of is that I was informed  25 that I would not be calculating the loss of stock</p>
<p style="text-align: right;">Page 1142</p> <p>1 A Certainly alternative assumptions will  2 generate alternative results, yes.  3 Q Yes, that's exactly what you testified to in  4 your deposition.  5 And if your opinion relies upon facts provided  6 by counsel, and those facts are not accurate, then  7 your opinion would not be accurate?  8 A It is based upon accuracy of the information  9 provided to me, that's correct.  10 Q Now, let's go back and talk about the  11 information that you actually relied on in this case.  12 You received certain information from Mr.  13 Carta's office, isn't that correct, sir?  14 A Yes, I did.  15 Q And aside from the information you received  16 from Mr. Carta's office, you made no independent  17 investigation about IBM's policies and practices, did  18 you?  19 A No, I did not.  20 Q So you have no idea how IBM evaluates job  21 performance?  22 A No, I do not.  23 Q You have no idea whether or how job  24 performance at IBM affects compensation?  25 A That's correct.</p>	<p style="text-align: right;">Page 1144</p> <p>1 options or any type of stock awards.  2 Q Okay. I want to ask you about some of these  3 assumptions that you received from Mr. Carta's office,  4 and if we can go to Defendant's Exhibit 213, please.  5 Defendant's Exhibit 213, Dr. Crakes -- and I  6 believe my binders up there? There are some black  7 binders up there, sir, if you want to see the hard  8 copy, or if you want to read it on screen.  9 A I believe I can read it on the screen.  10 Q All right, thank you, Dr. Crakes.  11 Now, these are your notes from certain  12 communications with a Ms. Sherman who used to work for  13 Mr. Carta's office, is that right?  14 A That's correct.  15 Q And I believe you testified with regard to  16 this information that these were all voicemails you  17 exchanged with Ms. Sherman, that you actually never  18 spoke to her about this, correct?  19 A I think with respect to those particular notes  20 on that page.  21 Q Yes.  22 A That's what it indicates at the top.  23 Q Yes. So let me take you down -- and this was  24 something dated March 12th, 2010, the notes in  25 questions, and this is your handwriting, correct?</p>

<p style="text-align: right;">Page 1145</p> <p>1 A Yes, it is.</p> <p>2 Q All right. So let me take you down to the</p> <p>3 point where it says age, 66. Your question appears to</p> <p>4 be -- your question's on the right, right? Intentions</p> <p>5 with regard to retirement, correct?</p> <p>6 A With respect to retirement, yes.</p> <p>7 Q And I gathered that the answer from Ms.</p> <p>8 Sherman was age 66?</p> <p>9 A Yes.</p> <p>10 Q Okay. So she told you that Mr. Castelluccio's</p> <p>11 intentions were to work until age 66?</p> <p>12 A That's correct.</p> <p>13 Q And that's why you used that figure, correct?</p> <p>14 A Well, as I indicated, I did consult</p> <p>15 statistical tables as well and felt that 66 was</p> <p>16 conservative given what those statistical tables would</p> <p>17 indicate.</p> <p>18 Q Now, you were not in court the other day when</p> <p>19 Mr. Castelluccio testified that he intended actually</p> <p>20 to retire at age 65, were you?</p> <p>21 A No, I was not.</p> <p>22 Q So if he intended to retire at age 65, not 66,</p> <p>23 your calculation wouldn't be correct.</p> <p>24 A Again, if there was an alternative assumption,</p> <p>25 there would be an alternative result, that's correct.</p>	<p style="text-align: right;">Page 1147</p> <p>1 to 60 or beyond.</p> <p>2 Q Let me read your answer, maybe it'll refresh</p> <p>3 your recollection.</p> <p>4 "I would say in the majority of the time I</p> <p>5 would use age 65 because I'm not dealing in the</p> <p>6 majority of cases with someone who's 61 years of age."</p> <p>7 A I think that's what I just indicated.</p> <p>8 Q There was a subsequent question that I asked</p> <p>9 you, which was, "Can you identify any of the expert</p> <p>10 reports in the long list that you gave to us, had for</p> <p>11 us, where you used 66, other than this case?" Do you</p> <p>12 remember my question?</p> <p>13 A I do, and I recall saying that no, I could not</p> <p>14 recall from looking at that list, that's correct.</p> <p>15 Q That's right. You said -- and I'm going to</p> <p>16 read it. This is line 14 page 128, Mr. Carta.</p> <p>17 "I have some cases where I will use both 65</p> <p>18 and 70. I don't recall if there are any where I</p> <p>19 specifically used 66."</p> <p>20 So but your study to the extent it's based on</p> <p>21 age 66 was based on what Ms. Sherman told you as to</p> <p>22 what Mr. Castelluccio's intentions were, correct?</p> <p>23 A In my consultation of the statistical tables</p> <p>24 for work life expectancy and years to final separation</p> <p>25 from the labor force, which were both beyond age 66,</p>
<p style="text-align: right;">Page 1146</p> <p>1 Q And you've done how many of these economic</p> <p>2 loss reports, hundreds?</p> <p>3 A Over the last 32 years, approximately</p> <p>4 somewhere around 2,800.</p> <p>5 Q And isn't it true that the majority of the</p> <p>6 time when you do -- when you project retirement age,</p> <p>7 the majority of cases you use age 65, right?</p> <p>8 A Depends on the circumstances of the case.</p> <p>9 That would certainly be true for younger workers.</p> <p>10 When I'm making a calculation for someone of Mr.</p> <p>11 Castelluccio's age at the time of termination, I most</p> <p>12 likely will go beyond 65.</p> <p>13 Q Well, let me ask you if you recall that I</p> <p>14 asked you that question during your deposition, do you</p> <p>15 recall that, sir?</p> <p>16 A I do. It was in the Morey case, I believe.</p> <p>17 Q Actually I asked you what percentage of the</p> <p>18 time do you use 65 and what percentage of the time do</p> <p>19 you use 66. Do you remember my asking you that?</p> <p>20 A Yes, I do.</p> <p>21 Q Do you remember what your answer was?</p> <p>22 A I think my answer was the majority of the time</p> <p>23 I use age 65, but I think I also indicated that it</p> <p>24 depends on the circumstances of the case, and for</p> <p>25 workers who are older it would not be unusual to go up</p>	<p style="text-align: right;">Page 1148</p> <p>1 that's why I felt it was not unreasonable in this case</p> <p>2 to make a calculation to that age.</p> <p>3 Q But this is all based on -- I understand what</p> <p>4 you're saying about the labor force and all of that</p> <p>5 stuff, but you didn't use 68, you used 66, and you</p> <p>6 used 66 because that's what she originally told you to</p> <p>7 do, all of your studies in this case have been based</p> <p>8 on that number.</p> <p>9 A All of my calculations have been based on age</p> <p>10 66 for the reasons I think I've indicated a number of</p> <p>11 times now.</p> <p>12 Q Right. Now, Mr. Carta asked you about pension</p> <p>13 reductions, and you said that in a prior study that</p> <p>14 you did you took pensions off, right, you deducted the</p> <p>15 value of the pensions?</p> <p>16 A Yes, I think I indicated that.</p> <p>17 Q Right. So indeed here are your notes from a</p> <p>18 prior study. Can you put 215 on the board?</p> <p>19 So number 215 are your notes of the study when</p> <p>20 I deposed you. These were the notes that you gave to</p> <p>21 us, and this shows that the value of the pension</p> <p>22 benefit as you calculated it there for 4.67 years was</p> <p>23 \$336,000, or whatever it was, and you took that away</p> <p>24 from the damage award, from his recovery, right?</p> <p>25 A In one of the analyses I performed, that's</p>

<p style="text-align: right;">Page 1149</p> <p>1 correct.</p> <p>2 Q And if the Court were to find that pension</p> <p>3 benefits had to be deducted, from any recovery of back</p> <p>4 pay, you would agree that you would have to take the</p> <p>5 pension benefits that Mr. Castelluccio received off of</p> <p>6 any recovery, correct?</p> <p>7 A Certainly if I were instructed to do so by the</p> <p>8 Court, that would be correct.</p> <p>9 Q And he could not be -- you would agree with me</p> <p>10 that as a matter of logic, he couldn't both be working</p> <p>11 and receive wages and be retired and receiving</p> <p>12 retirement benefits, right? That doesn't happen.</p> <p>13 A Well, not from the same employer, but I also</p> <p>14 did not calculate the value of any reduced pension</p> <p>15 benefit that Mr. Castelluccio has experienced because</p> <p>16 of his earlier retirement. The pension benefit that</p> <p>17 he would have received at age 66 is greater than what</p> <p>18 he received actually at age 61.</p> <p>19 Q Can you try to answer my question, sir?</p> <p>20 A I thought I was. I'm sorry.</p> <p>21 Q That's all right. I just asked you whether it</p> <p>22 was logical that he could both be working and retired,</p> <p>23 and I think -- I'll withdraw it. I think we all know</p> <p>24 the answer to that. He can't be both working and</p> <p>25 earning wages as you would have him receiving back pay</p>	<p style="text-align: right;">Page 1151</p> <p>1 successor, right?</p> <p>2 A No, I did not. I'm just indicating that I did</p> <p>3 have some information with respect to what that</p> <p>4 incentive compensation was for his successor, which</p> <p>5 was greater than what I'd estimated for Mr.</p> <p>6 Castelluccio.</p> <p>7 Q Correct. But his successor was -- his</p> <p>8 successor, you mean Miguel Echavarria, right?</p> <p>9 A I believe so, yes.</p> <p>10 Q And he was -- he replaced Mr. Castelluccio</p> <p>11 back in 2007, right?</p> <p>12 A I don't know the exact point at which that</p> <p>13 occurred.</p> <p>14 Q You don't know the exact point at which that</p> <p>15 occurred.</p> <p>16 You don't know, do you, when Mr.</p> <p>17 Castelluccio -- well, let's put it this way: You</p> <p>18 don't know Mr. Castelluccio's job performance in 2007</p> <p>19 and 2008, right?</p> <p>20 A That's correct.</p> <p>21 Q And you don't know Mr. Echavarria's job</p> <p>22 performance in 2007, 2008, 2009, 2010?</p> <p>23 A That's correct.</p> <p>24 Q Okay. So you would agree that the jury, if</p> <p>25 they were actually going to try to come up with an</p>
<p style="text-align: right;">Page 1150</p> <p>1 for and receive retirement benefits at the same time.</p> <p>2 You can't do both.</p> <p>3 A Not from the same employer, that's true.</p> <p>4 Q And let's just go ahead -- now, let's talk a</p> <p>5 little bit about incentive earnings, which you</p> <p>6 calculated. Incentive earnings meanings bonus, right?</p> <p>7 A It's what's referred to as incentive</p> <p>8 compensation.</p> <p>9 Q Right. And I think you already testified that</p> <p>10 you made no inquiry into how IBM calculates this, and</p> <p>11 into actual fluctuations and incentive pay you just</p> <p>12 took his incentive pay for that last four years of</p> <p>13 employment, divided it by 4, and projected it into the</p> <p>14 future, correct?</p> <p>15 A For the past period until March 2nd of 2013,</p> <p>16 yes.</p> <p>17 Q So if we were doing an actual accurate study,</p> <p>18 instead of a mathematical study, wouldn't the jury</p> <p>19 need to know what incentive payments were at IBM</p> <p>20 during the period from Mr. Castelluccio's termination</p> <p>21 until 2013?</p> <p>22 A Well, I did review information on that for his</p> <p>23 successor as well. That incentive compensation was</p> <p>24 greater than what I employed in my analysis.</p> <p>25 Q I see. But you didn't base your study on his</p>	<p style="text-align: right;">Page 1152</p> <p>1 actual number that Mr. Castelluccio might have</p> <p>2 received, would need further information, wouldn't</p> <p>3 you?</p> <p>4 A The information that was available was what he</p> <p>5 actually had experienced. I did rely on that.</p> <p>6 Q I understand that.</p> <p>7 Now, let's look for a moment -- would you put</p> <p>8 number 223 up, please?</p> <p>9 Now, these are your notes again?</p> <p>10 A Yes, they are.</p> <p>11 Q Salary plus incentive pay during this period</p> <p>12 of time?</p> <p>13 A That's correct.</p> <p>14 Q And the incentive pay we've highlighted, and</p> <p>15 that varied year to year, didn't it?</p> <p>16 A Yes, it did.</p> <p>17 Q Substantially, almost -- not quite doubled</p> <p>18 from '05 to '06, but it almost doubled, right?</p> <p>19 A It was a large increase from '05 to '06, yes.</p> <p>20 Q And a decrease from '04 to '05?</p> <p>21 A That's correct.</p> <p>22 Q So your assumption is that this pattern would</p> <p>23 have just gone on and on just like this?</p> <p>24 A I relied on taking the average of those</p> <p>25 values.</p>

<p style="text-align: right;">Page 1153</p> <p>1 Q Okay. And let's put up 218, please.</p> <p>2 And so that would have affected his income as</p> <p>3 well, right? These are your notes from his income.</p> <p>4 And particularly the last two years, those are options</p> <p>5 he cashed out, I think, that pop those up.</p> <p>6 But the point is that this varied year to</p> <p>7 year, the earlier years it's lower, the later years</p> <p>8 it's higher, right?</p> <p>9 A Well, his incentive compensation actually was,</p> <p>10 as I think you indicated, did fluctuate from year to</p> <p>11 year, which is why I took the average.</p> <p>12 Q Now, your figure for health insurance, you</p> <p>13 testified that you took IBM's cost of the health</p> <p>14 insurance?</p> <p>15 A No, the cost to Mr. Castelluccio.</p> <p>16 Q I see.</p> <p>17 A Of his health insurance with IBM.</p> <p>18 Q So this was money that he paid to IBM for his</p> <p>19 health insurance?</p> <p>20 A That he contributed toward his health</p> <p>21 insurance, yes.</p> <p>22 Q I see. And subtracted out what he contributed</p> <p>23 when he was unemployed?</p> <p>24 A The value of what he had to contribute</p> <p>25 subsequent to his termination, I subtracted from that</p>	<p style="text-align: right;">Page 1155</p> <p>1 number 213 again, please?</p> <p>2 And you asked Ms. Sherman about that, you said</p> <p>3 earnings, alternative employment, correct?</p> <p>4 A Yes, I did.</p> <p>5 Q And she said -- apparently she said no, right?</p> <p>6 A That's correct.</p> <p>7 Q So you didn't deduct any alternative earnings</p> <p>8 that Mr. Castelluccio -- and this is in 2010, right,</p> <p>9 she said this to you?</p> <p>10 A Yes.</p> <p>11 Q So you didn't deduct any alternative earnings</p> <p>12 from this sum because Ms. Sherman told you not to do</p> <p>13 it?</p> <p>14 A Well, I think I had inquired as to whether or</p> <p>15 not there had been any earnings from alternative</p> <p>16 employment, and at that point in time Ms. Sherman said</p> <p>17 to me that there had not. Subsequent to that I was</p> <p>18 requested to make an assumption that there would not</p> <p>19 be.</p> <p>20 Q I see.</p> <p>21 A Over the future time period.</p> <p>22 Q I see. But so you never -- you've never taken</p> <p>23 anything off for alternative employment, mitigation of</p> <p>24 damages, right?</p> <p>25 A It's my understanding Mr. Castelluccio has not</p>
<p style="text-align: right;">Page 1154</p> <p>1 what he actually was paying while he was employed by</p> <p>2 IBM.</p> <p>3 Q And what was the figure that you subtracted</p> <p>4 out, sir?</p> <p>5 A If I could just have a moment to look at my</p> <p>6 notes.</p> <p>7 Q Sure.</p> <p>8 A The value that I subtracted was \$478.</p> <p>9 Q \$478 a month?</p> <p>10 A That's correct.</p> <p>11 Q Now, if he testified that he was, in fact,</p> <p>12 paying 6 or \$700 a month, that would make a difference</p> <p>13 in your calculations, wouldn't it?</p> <p>14 A That would be correct, yes.</p> <p>15 Q Okay. But you are not aware that he --</p> <p>16 whether he testified to that or not, are you?</p> <p>17 A I don't know.</p> <p>18 Q Now, the one thing that you didn't discuss in</p> <p>19 your study here is alternative employment.</p> <p>20 Alternative employment, you agree with me, that</p> <p>21 mitigation of damages, that is -- means that if there</p> <p>22 are any alternative earnings, that would need to be</p> <p>23 subtracted from any recovery?</p> <p>24 A Yes.</p> <p>25 Q And in fact, if you go back -- can we put up</p>	<p style="text-align: right;">Page 1156</p> <p>1 been able to experience any alternative employment.</p> <p>2 Q Well, let me go back to, in a more abstract</p> <p>3 fashion. If Mr. Castelluccio had -- when he was</p> <p>4 unemployed, if he had gotten another job of any sort,</p> <p>5 you would have deducted that, those earnings, wouldn't</p> <p>6 you?</p> <p>7 A Yes, I would have.</p> <p>8 Q So if he went to work at a 7-Eleven or if he</p> <p>9 went to work as a volunteer at a hospital and received</p> <p>10 minor sum --</p> <p>11 MR. CARTA: Objection.</p> <p>12 THE COURT: Sir, the basis?</p> <p>13 MR. CARTA: The hypothetical is outside</p> <p>14 what's permissible. There's no law that says someone</p> <p>15 has to become a clerk when they've been an executive.</p> <p>16 In fact, the law is very clear. So the hypothetical</p> <p>17 is irrelevant and not probative of anything.</p> <p>18 THE COURT: Okay. Well, it's fair</p> <p>19 cross-examination. Go ahead, Mr. Fasman.</p> <p>20 BY MR. FASMAN:</p> <p>21 Q I was just asking if he had acquired outside</p> <p>22 income from any source, wherever he worked, whether it</p> <p>23 was a volunteer with a small stipend or working</p> <p>24 at whatever gas station, whatever you like, that would</p> <p>25 have to be deducted, right?</p>



<p style="text-align: right;">Page 1157</p> <p>1 A Any earnings from alternative employment would 2 have to be subtracted, yes. 3 Q And you would agree with me that in most 4 employment cases there's an estimate of what would 5 have been earned by the plaintiff versus what the 6 alternative earnings would be, right? 7 MR. CARTA: Objection. 8 MR. FASMAN: I'll withdraw that. Let me 9 be a little clearer. 10 THE COURT: Okay. 11 BY MR. FASMAN: 12 Q So you did not take out alternative earnings 13 in this case initially because of what Ms. Sherman 14 told you, right? 15 A Up until that time there had not been any, and 16 I was requested to assume there would not be. 17 Q And then later you didn't take anything off 18 because you were told he did not have any alternative 19 earnings, right? 20 A Yes. And of course as of today he has not, so 21 since all the losses in the past -- 22 Q Hang on one second, Dr. Crakes. You're not an 23 expert in employee placement, are you? 24 A No, I'm not. 25 Q You're not an expert in recruitment.</p>	<p style="text-align: right;">Page 1159</p> <p>1 witness -- outside the scope of direct. It's also -- 2 the witness indicated repeatedly that this is not his 3 area of expertise. 4 THE COURT: Well, now, it seems to me Mr. 5 Fasman is identifying wages of salary which would 6 accompany a Band 10 position and simply asking the 7 Doctor whether such wages from the same employer would 8 be deducted from his calculation. 9 MR. FASMAN: I think the answer is pretty 10 obvious, but I would like an answer. 11 THE COURT: I think it's pretty obvious, 12 too. We'll see. Doctor? 13 THE WITNESS: I would have made no such 14 deduction. 15 BY MR. FASMAN: 16 Q But if he were able to obtain such a job, you 17 would think the deduction would be proper, right? 18 A If he had obtained such a position, I would 19 have subtracted the earnings associated with it. 20 Q Okay. A couple more questions only, Dr. 21 Crakes. On Exhibit 222, 222 is a list of all the 22 cases in which you testified, and we won't -- it's 23 about ten pages long. I can't remember. This is the 24 list you gave us at the time of your deposition, and I 25 saw another one the other day that added a lot of</p>
<p style="text-align: right;">Page 1158</p> <p>1 A That's correct. 2 Q You're not an expert -- you never testified on 3 either subject, correct? 4 A That's correct. 5 Q You don't know what a reasonable job search 6 is, you couldn't testify to that, could you? 7 A No, I could not. 8 Q And if the jury were to find that Mr. 9 Castelluccio did not conduct a reasonable job search, 10 you would have no basis upon which to say that that -- 11 that sums he could have earned through a reasonable 12 job search would not be deducted from his back pay, 13 right? 14 A I'm not qualified to make any determination as 15 to the nature of a reasonable job search. 16 Q And you made no study of whether he did a 17 reasonable job search or not, that's not your 18 expertise, right? 19 A That's correct. 20 Q Now, if I told you that he could have looked 21 for a position with IBM at a numerical band and 22 suffered a small decrease in salary, that would be 23 alternative earnings that the jury would have to 24 deduct, right? 25 MR. CARTA: Objection, Your Honor. The</p>	<p style="text-align: right;">Page 1160</p> <p>1 cases to it. You're a busy man, obviously. 2 A Well, four years have elapsed. 3 Q So there you go. But on this list that you 4 gave us, on all of these cases, only two of them were 5 employment cases, right? That's what you testified. 6 A That's my recollection, yes. 7 Q And of all of -- on all of these cases, this 8 ten-page list, only two of them -- or all but two or 9 three were on behalf of the plaintiff, right? You 10 testified on behalf of the plaintiff in all but two or 11 three. 12 A That's correct. 13 Q And in your inquiries in this case about the 14 facts of this case, you didn't even inquire as to 15 whether this was an age discrimination case, did you? 16 A I don't believe I did. 17 MR. FASMAN: I have no further questions 18 of this witness, Your Honor. 19 THE COURT: Sir, Mr. Carta. 20 MR. CARTA: Yes, I think I have two. 21 22 REDIRECT EXAMINATION BY MR. CARTA: 23 24 Q Dr. Crakes, have you spoken directly to Mr. 25 Castelluccio about when he intended to cease work if</p>

<p style="text-align: right;">Page 1161</p> <p>1 he had not been terminated by IBM?</p> <p>2 A Yes.</p> <p>3 Q And what did he tell you?</p> <p>4 MR. FASMAN: Objection, hearsay.</p> <p>5 THE COURT: Pardon me?</p> <p>6 MR. FASMAN: Objection, hearsay.</p> <p>7 MR. CARTA: Your Honor, it's information</p> <p>8 relied on by an expert. It's absolutely admissible.</p> <p>9 THE COURT: I'll allow it.</p> <p>10 THE WITNESS: He indicated to me that he</p> <p>11 intended to work to age 66.</p> <p>12 BY MR. CARTA:</p> <p>13 Q And was that the basis of the final</p> <p>14 calculation that you presented to the jury?</p> <p>15 A Well, I compared that to what the tables,</p> <p>16 again, demonstrated for work life expectancy in years</p> <p>17 of final separation from the labor source for a man of</p> <p>18 Mr. Castelluccio's age and education, which would have</p> <p>19 been something between ages 68 and 69, and I felt it</p> <p>20 was therefore reasonable to make a calculation to age</p> <p>21 66.</p> <p>22 Q Okay. Mr. Fasman asked you a series of</p> <p>23 questions about your internal calculations before Mr.</p> <p>24 Castelluccio had reached the March 2013 time and what</p> <p>25 assumptions you made about whether or not he was or</p>	<p style="text-align: right;">Page 1163</p> <p>1 times.</p> <p>2 Q When?</p> <p>3 A Once about perhaps a year, year and a half</p> <p>4 ago, and then just a few weeks ago.</p> <p>5 Q I see. So he told you one thing and he</p> <p>6 testified here to something entirely different, under</p> <p>7 oath.</p> <p>8 He wasn't under oath when he talked to you,</p> <p>9 was he?</p> <p>10 A No, I usually don't do that to people.</p> <p>11 Q I know. Thanks, Dr. Crakes.</p> <p>12 MR. CARTA: No further questions.</p> <p>13 THE COURT: Mr. Carta?</p> <p>14 MR. CARTA: No further questions.</p> <p>15 THE COURT: Doctor, thanks very much for</p> <p>16 being with us. You may step down.</p> <p>17 THE WITNESS: Thank you, Your Honor.</p> <p>18 MR. CARTA: Your Honor, Dr. Crakes was my</p> <p>19 final witness, and I rest.</p> <p>20 THE COURT: I'm sorry?</p> <p>21 MR. CARTA: Dr. Crakes was my final</p> <p>22 witness, and I rest.</p> <p>23 THE COURT: Okay. The record should</p> <p>24 reflect that the Plaintiffs have rested.</p> <p>25 Are you ready to go forward?</p>
<p style="text-align: right;">Page 1162</p> <p>1 was not going to get gainful employment. In terms of</p> <p>2 your final analysis, and the final calculation that</p> <p>3 you presented to the jury, what was the basis of your</p> <p>4 conclusion not to deduct anything in this instance for</p> <p>5 income earned by Mr. Castelluccio in the 4.67 years?</p> <p>6 A Because he has not had any.</p> <p>7 Q The fact that he didn't have any income?</p> <p>8 A That's correct.</p> <p>9 Q Didn't have anything to do with what my former</p> <p>10 associate had indicated might have happened, right?</p> <p>11 A That's correct. He had not experienced any</p> <p>12 earnings over that period of time.</p> <p>13 Q It had to do with what actually happened?</p> <p>14 A Yes.</p> <p>15 MR. CARTA: No further questions.</p> <p>16 MR. FASMAN: Your Honor, one or two?</p> <p>17</p> <p>18 RECROSS EXAMINATION BY MR. FASMAN:</p> <p>19</p> <p>20 Q Dr. Crakes, when did you have this</p> <p>21 conversation with Mr. Castelluccio when he told you</p> <p>22 that he was going to retire at age 66?</p> <p>23 A I believe there were a couple of occasions</p> <p>24 when I met with Mr. Castelluccio at Attorney Carta's</p> <p>25 office, and that he had indicated to me at those</p>	<p style="text-align: right;">Page 1164</p> <p>1 MR. FASMAN: Yes, we are, Your Honor.</p> <p>2 THE COURT: Okay. I've read your Rule 50</p> <p>3 motions, I read the opposition, and I'm going to hold</p> <p>4 a decision on that under advisement, which again after</p> <p>5 checking I believe is the preferred practice in the</p> <p>6 Second Circuit.</p> <p>7 So call your first witness, sir.</p> <p>8 MR. FASMAN: Thank you, Your Honor. Mr.</p> <p>9 Duffield will inquire initially.</p> <p>10 MR. DUFFIELD: We call Dave Liederbach.</p> <p>11 THE COURT: Good morning, Mr. Liederbach.</p> <p>12 THE WITNESS: Good morning, Judge.</p> <p>13 (David Liederbach, sworn by the clerk)</p> <p>14 THE CLERK: Please state your name, spell</p> <p>15 your last name for the record.</p> <p>16 THE WITNESS: Dave Liederbach, spelled</p> <p>17 L-I-E-D-E-R-B-A-C-H.</p> <p>18 THE COURT: What does that mean in</p> <p>19 German?</p> <p>20 THE WITNESS: Singing brook, song brook.</p> <p>21 THE COURT: Lieder is song. What is the</p> <p>22 bach?</p> <p>23 THE WITNESS: I'm going to have to call</p> <p>24 on my father for that.</p> <p>25 THE COURT: Okay. Excuse me, I didn't</p>

Page 1165	Page 1167
<p>1 mean to interrupt.</p> <p>2 MR. DUFFIELD: No problem.</p> <p>3 THE CLERK: Your business address,</p> <p>4 please?</p> <p>5 THE WITNESS: 590 Madison Avenue, New</p> <p>6 York New York.</p> <p>7</p> <p>8 DIRECT EXAMINATION BY MR. DUFFIELD:</p> <p>9</p> <p>10 Q Good morning, Mr. Liederbach.</p> <p>11 A Good morning.</p> <p>12 Q Would you please introduce yourself to the</p> <p>13 jury, tell them how old you are, how long you've been</p> <p>14 with IBM and what your current position is, please?</p> <p>15 A My name's Dave Liederbach. I am 51 years old.</p> <p>16 I worked for IBM company for 29 years. My current</p> <p>17 title is vice president of growth and integration.</p> <p>18 Q Did you attend college after high school, Mr.</p> <p>19 Liederbach?</p> <p>20 A Yes, I did. I had an undergraduate degree</p> <p>21 from the University of Michigan in chemical</p> <p>22 engineering. I have a master's in business</p> <p>23 administration from Case Western Reserve University in</p> <p>24 Cleveland, Ohio.</p> <p>25 Q And did you have any employment before working</p>	<p>1 what period of time frame you served in that role?</p> <p>2 A 2006 through 2009.</p> <p>3 Q And would you please explain for the jury what</p> <p>4 your responsibilities were as a general manager of</p> <p>5 public sector?</p> <p>6 A Public sector in our definition includes</p> <p>7 healthcare clients, life sciences or pharmaceutical</p> <p>8 clients, education, and different parts of the</p> <p>9 government, predominantly state government and local</p> <p>10 government, and I had responsibility for the account</p> <p>11 management. That means delivering a service and</p> <p>12 satisfaction to an existing set of clients, and sales</p> <p>13 responsibility for acquiring new clients to the</p> <p>14 services that we provide.</p> <p>15 Q And did you have people reporting directly to</p> <p>16 you?</p> <p>17 A Yes, I did.</p> <p>18 Q Approximately how many people?</p> <p>19 A Approximately ten people reporting directly to</p> <p>20 me.</p> <p>21 Q And what kind of positions did they hold?</p> <p>22 A Typically it was vice president level or</p> <p>23 director level positions.</p> <p>24 Q And when you came into the role as general</p> <p>25 manager of public sector, was Mr. Castelluccio already</p>
Page 1166	Page 1168
<p>1 for IBM?</p> <p>2 A I did not.</p> <p>3 Q And when did you join IBM?</p> <p>4 A July 2nd, 1984.</p> <p>5 Q And could you briefly walk us through your</p> <p>6 employment history at IBM up to your current position?</p> <p>7 A I spent about ten years in sales and sales</p> <p>8 management positions, followed by about five or six</p> <p>9 years in our software business where I had marketing</p> <p>10 and product management responsibility, followed by</p> <p>11 about ten years in a range of different positions in</p> <p>12 our services business, which brings me to my current</p> <p>13 responsibilities now.</p> <p>14 Q And have you ever heard the phrase, "Your</p> <p>15 career is your responsibility," at IBM?</p> <p>16 A Yes, I have.</p> <p>17 Q And what does that mean?</p> <p>18 A It means that it is the obligation of the</p> <p>19 employee to keep their skills adequate, to serve their</p> <p>20 responsibilities inside of IBM and the marketplace,</p> <p>21 and it's their responsibility to document their career</p> <p>22 direction.</p> <p>23 Q I'd like to direct your attention now to the</p> <p>24 period of time when you were serving as the general</p> <p>25 manager of the public sector in GTS. Do you remember</p>	<p>1 in his role as VP of delivery for public sector?</p> <p>2 A Correct.</p> <p>3 Q Had you worked with him prior to this time?</p> <p>4 A No.</p> <p>5 Q Mr. Castelluccio has testified that the two of</p> <p>6 you worked together in your various roles in the</p> <p>7 public sector. Can you explain what kind of</p> <p>8 interaction you would have had with him?</p> <p>9 A So Jim had responsibility for service delivery</p> <p>10 to the clients that I had overall client relationship</p> <p>11 and business management responsibility for. So it was</p> <p>12 a very close business relationship where I have a high</p> <p>13 degree of dependency on Jim and his team and the</p> <p>14 services they provide to my clients.</p> <p>15 Q And in your role as the vice president of</p> <p>16 public sector, did you have an opportunity to observe</p> <p>17 Mr. Castelluccio's performance in his role?</p> <p>18 A Yes.</p> <p>19 Q And what did you observe?</p> <p>20 A Shortly into our tenure together, based on</p> <p>21 escalations that had come from my management team to</p> <p>22 me, and direct observations, there was a set of</p> <p>23 performance concerns associated with Jim</p> <p>24 Castelluccio's performance.</p> <p>25 Q Can you elaborate on what those performance</p>



<p style="text-align: right;">Page 1169</p> <p>1 concerns were?</p> <p>2 A They were in the area of responsiveness and</p> <p>3 communication to my management team that was dependant</p> <p>4 on either he or his employee base to serve our</p> <p>5 clients. It also included areas where we had</p> <p>6 performance issues of employees. Either they weren't</p> <p>7 performing the job that they were assigned, and/or the</p> <p>8 individual was deemed by the client to be ineffective</p> <p>9 in the job role. And in our business your job is to</p> <p>10 satisfy clients, and you need to response quickly to</p> <p>11 these changes, and that was not occurring.</p> <p>12 Q So you mentioned one of the concerns you had</p> <p>13 was communication, Mr. Castelluccio's communication</p> <p>14 with your direct reports and with the client. Can you</p> <p>15 elaborate on that a little bit, tell us what you mean,</p> <p>16 what the issues were?</p> <p>17 A Communications, you know, would include</p> <p>18 responding to agreements that were made between</p> <p>19 business parties. It would include responding to</p> <p>20 telephone calls inquiring about progress on those</p> <p>21 activities, or e-mail or other forms of communication.</p> <p>22 Q Kelton Jones was here on Friday and testified,</p> <p>23 and testified that you had raised some of these</p> <p>24 concerns with him in 2006. Do you remember having</p> <p>25 conversations with Mr. Jones about his issues?</p>	<p style="text-align: right;">Page 1171</p> <p>1 Q And if you want to look on the screen there to</p> <p>2 your right, and read for the jury the highlighted</p> <p>3 portions of Mr. Nicoletti's e-mail.</p> <p>4 A "Jim, I want to confirm that we are still on</p> <p>5 track to reduce the resources --" an acronym that</p> <p>6 stands for WellPoint "-- in the June resource action</p> <p>7 in line with what we all agreed to in the Palisades</p> <p>8 meeting." Second line. "I assume we are still on</p> <p>9 track to remove approximately 60 resources at the end</p> <p>10 of June. Please confirm."</p> <p>11 Q So the reduction of resources on the WellPoint</p> <p>12 account, was that something that fell within Mr.</p> <p>13 Castelluccio's job responsibilities?</p> <p>14 A Correct.</p> <p>15 Q If you'll turn back to the first page, there's</p> <p>16 a follow-up e-mail from Mr. Nicoletti to Mr.</p> <p>17 Castelluccio. This one is now dated April 28th, three</p> <p>18 days later, and Mr. Nicoletti says to Mr.</p> <p>19 Castelluccio, "I never received a response to this</p> <p>20 request." Do you see that?</p> <p>21 A I do.</p> <p>22 Q And is that acceptable, to go without a</p> <p>23 response for three days on an issue like this?</p> <p>24 A No. I would consider a 24-hour response to be</p> <p>25 an adequate response for a business issue of this</p>
<p style="text-align: right;">Page 1170</p> <p>1 A Yes.</p> <p>2 Q What did you say to him? Do you remember?</p> <p>3 A First, I documented based on input sent to me</p> <p>4 from my employees that they had a set of concerns in</p> <p>5 the areas that I just described. I took that</p> <p>6 communication and added my own direct personal</p> <p>7 experience, and sent an e-mail to Kelton Jones for his</p> <p>8 edification, and then we agreed to a follow-up phone</p> <p>9 call discussion to go into the details of that</p> <p>10 performance.</p> <p>11 Q If you would please turn to Defendant's</p> <p>12 Exhibit 12. You should have two black binders up</p> <p>13 there. Maybe at your feet. And the first one.</p> <p>14 A I'm sorry, Exhibit 12?</p> <p>15 Q 12, yes. Take a minute to familiarize</p> <p>16 yourself with it. Let me know when you're ready.</p> <p>17 A Okay.</p> <p>18 Q If you'll turn to the second page of the</p> <p>19 e-mail string, the first e-mail is from a Chris</p> <p>20 Nicoletti to Jim Castelluccio on April 25th, 2006.</p> <p>21 Who was Chris Nicoletti?</p> <p>22 A Chris Nicoletti reported to me as a set of</p> <p>23 vice presidents that worked for me. Chris was</p> <p>24 responsible for the healthcare and life science</p> <p>25 clients within our organization.</p>	<p style="text-align: right;">Page 1172</p> <p>1 size.</p> <p>2 Q So a delay of three days, is that significant</p> <p>3 in your mind?</p> <p>4 A Correct.</p> <p>5 Q Why?</p> <p>6 A As the e-mails indicate, this is an</p> <p>7 escalation, and then in Chris's first note he's</p> <p>8 escalating the situation because he hasn't heard back,</p> <p>9 now three days later he's raising it again to Jim's</p> <p>10 attention, and there are client service and business</p> <p>11 issues at hand if these items aren't addressed.</p> <p>12 Q Is this the only example of this kind of issue</p> <p>13 being escalated to your attention?</p> <p>14 A No, it's not.</p> <p>15 Q If you go to the top e-mail, you then forward</p> <p>16 this on to Kelton Jones a couple days later, and you</p> <p>17 start by saying, "Kelton, please do not forward."</p> <p>18 Why did you not want Mr. Jones to forward this</p> <p>19 e-mail?</p> <p>20 A My intention on doing that was to give Kelton</p> <p>21 and I the opportunity to have a full discussion and</p> <p>22 make sure I had complete context from Kelton's</p> <p>23 perspective on this escalation and was it possible</p> <p>24 that there were other conditions or factors that were</p> <p>25 preventing what I consider adequate response to the</p>

<p style="text-align: right;">Page 1173</p> <p>1 request.</p> <p>2 Q So before anyone else knew about this issue,</p> <p>3 you wanted to discuss it with Mr. Castelluccio's</p> <p>4 manager and see the full context before escalating it</p> <p>5 further, correct?</p> <p>6 A Correct.</p> <p>7 Q If you'll read the first paragraph of your</p> <p>8 e-mail to Mr. Jones for us. It should be highlighted</p> <p>9 on the screen.</p> <p>10 A "The attached is one of a stream of notes that</p> <p>11 I get from my executives with concerns on</p> <p>12 responsiveness or follow-up from Jim. I'm</p> <p>13 experiencing the same issues, be them --" excuse my</p> <p>14 typing at the time "-- e-mails or calls to his</p> <p>15 cellphone. I have raised this to Jim's attention in</p> <p>16 the recent past."</p> <p>17 Q Do you have a recollection of discussing these</p> <p>18 issues with Mr. Castelluccio?</p> <p>19 A I do prior to this note.</p> <p>20 Q And what did you say to Mr. Castelluccio?</p> <p>21 A Very consistent with what's captured in this</p> <p>22 e-mail, that there were a set of significant business</p> <p>23 issues that needed attention, and that my management</p> <p>24 team was not getting response to those requests.</p> <p>25 Q And what was Mr. Castelluccio's response?</p>	<p style="text-align: right;">Page 1175</p> <p>1 Do you remember having a conversation with Mr.</p> <p>2 Jones about this?</p> <p>3 A Yes, I do.</p> <p>4 Q If you would turn to Exhibit 13. That would</p> <p>5 be the next document in your binder. This is now</p> <p>6 about a week later, an e-mail from you to Mr. Jones on</p> <p>7 May 5th, 2006. If you would read the first paragraph,</p> <p>8 please.</p> <p>9 A "Jim and I spoke for an hour yesterday as a</p> <p>10 follow-up to your and my discussion. I shared</p> <p>11 examples of my concerns. To Jim's credit, we spent</p> <p>12 little time rationalizing the past and committed to</p> <p>13 the following."</p> <p>14 Q So that sounds consistent with what you were</p> <p>15 just telling us.</p> <p>16 I'd like to now walk through these bullet</p> <p>17 points slowly. The first one you have "Communications</p> <p>18 between our executive teams will improve." What was</p> <p>19 your discussion with Mr. Castelluccio about this</p> <p>20 bullet point?</p> <p>21 A Just very straightforward, that if there were</p> <p>22 business issues, either on service performance or HR</p> <p>23 personnel related concerns or service quality concerns</p> <p>24 that my team was raising to Jim, that there would be</p> <p>25 response and communication on those items.</p>
<p style="text-align: right;">Page 1174</p> <p>1 A I don't recall the specific response, but I</p> <p>2 don't remember contention or debate on the discussion.</p> <p>3 Q Would you read the next paragraph, please?</p> <p>4 A "If there are issues outside of work that I</p> <p>5 need to understand that would explain the situation,</p> <p>6 let's talk. Otherwise, I believe we need to consider</p> <p>7 an immediate change in his execution or a change in</p> <p>8 leadership. I will call Monday to get your insights."</p> <p>9 Q All right. Do you remember if Mr. Jones</p> <p>10 raised any outside issues with you that would have</p> <p>11 affected Mr. Castelluccio's ability to be responsive</p> <p>12 to your managers?</p> <p>13 A He did not.</p> <p>14 Q And in the second sentence you say you need to</p> <p>15 consider an immediate change in execution or change in</p> <p>16 leadership. What did you mean by that, change in</p> <p>17 leadership?</p> <p>18 A The first condition was to work with Jim to</p> <p>19 correct the performance concerns. The second</p> <p>20 alternative was to change the leader or change the</p> <p>21 position that Jim was in.</p> <p>22 Q So remove Mr. Castelluccio from the DPE role?</p> <p>23 A Correct.</p> <p>24 Q And then you ended with, "I will call on</p> <p>25 Monday."</p>	<p style="text-align: right;">Page 1176</p> <p>1 Q And Mr. Castelluccio committed to you that he</p> <p>2 would work on that?</p> <p>3 A Correct.</p> <p>4 Q The next bullet point, "Commitments on service</p> <p>5 delivery, resource changes and all key business</p> <p>6 decisions will be executed as discussed and within</p> <p>7 time frames." What did you mean by that?</p> <p>8 A So these are the core elements of the job and</p> <p>9 where both myself at this point in time and my</p> <p>10 management team is dependent on Jim and his management</p> <p>11 team. So executing service delivery to our clients,</p> <p>12 making changes to resources, either improving skills</p> <p>13 or changing skills, and then business decision, it</p> <p>14 could mean commitment to a date to deliver a project</p> <p>15 to a client, it could be adjustments and resource</p> <p>16 levels on a client, and it was commitment to execute</p> <p>17 to the agreements that were made between our teams.</p> <p>18 Q So basically do what you say you're going to</p> <p>19 do?</p> <p>20 A Correct.</p> <p>21 Q And Mr. Castelluccio committed that he would</p> <p>22 start doing this?</p> <p>23 A Yes.</p> <p>24 Q And the third bullet point, "Client centric</p> <p>25 and proactive leadership behaviors are required of all</p>

<p style="text-align: right;">Page 1177</p> <p>1 executives and senior managers within our teams."  2 What did you and Mr. Castelluccio discuss with regard  3 to this bullet point?  4 A So the term "client centric," we're in a  5 business to serve clients, and so it is a professional  6 behavior that says you're operating on behalf of the  7 client, and then secondly, the proactive leadership,  8 it's not just enough to do what you are told to do, at  9 the level of executives that we are in these  10 positions, you're accountable to anticipate needs and  11 changes based on your own capability.  12 Q And again, Mr. Castelluccio committed to you  13 that he would focus on this performance issue?  14 A Correct.  15 Q At the end of your e-mail you say, "I have  16 added a bi-weekly meeting with Jim on service delivery  17 performance and cost management." Did you, in fact,  18 set up these bi-weekly meetings with Mr. Castelluccio?  19 A Yes. My office did.  20 Q And for how long did those meetings continue?  21 A I don't have precision on that, but I would  22 say several months.  23 Q And how long were the meetings?  24 A We would spend 45 minutes to an hour.  25 Q And anyone in there other than just the two of</p>	<p style="text-align: right;">Page 1179</p> <p>1 escalating, as written in the set of bullets deeper in  2 the e-mail, six or seven issues or conditions that he  3 needed Jim -- Jim's team to address to improve the  4 situation with this client.  5 Q And the top e-mail, Keenie McDonald forwards  6 it to you, and would you please read her e-mail to  7 you.  8 A "Dave, I am sending this to you only. I feel  9 like you and I are getting no help from Jim to improve  10 delivery and to take out cost. Luis and John do not  11 feel our team gets any help/value from Jim, and we  12 need it."  13 Q Did you share Ms. McDonald's feeling that you  14 weren't getting the help from Mr. Castelluccio on  15 delivery?  16 A Yes.  17 Q And why did you feel that way?  18 A Again, to repeat the points that I made  19 earlier, we had issues in terms of communication  20 between management, we had failure to execute on  21 service delivery, people or resource decisions, and  22 part of the cost or financial management parts of the  23 contract.  24 Q And how did these issues affect IBM's  25 relationship with your clients and your customers?</p>
<p style="text-align: right;">Page 1178</p> <p>1 you?  2 A For these meetings, some of them were  3 one-on-one, other situations I would expect parts of  4 our management team would be involved in the  5 conversation.  6 Q And did you see improvement in Mr.  7 Castelluccio's performance?  8 A There was not material improvement.  9 THE COURT: Sir, can you tell me how long  10 these meetings lasted, over what period? I didn't  11 hear it.  12 THE WITNESS: Judge, I apologize, I don't  13 have a precise duration, but my recollection would be  14 several months.  15 BY MR. DUFFIELD:  16 Q If you would turn to Defendant's Exhibit  17 number 15. The bottom e-mail is from Luis Fernandez  18 to Jim Castelluccio. It's dated September 20th, 2006.  19 So the earlier e-mails we just looked at were the  20 April-May time frame. We're now in September of 2006.  21 Can you please explain to the jury the nature of Mr.  22 Fernandez's e-mail to Mr. Castelluccio? What was the  23 issue they were discussing?  24 A So Luis Fernandez was what was called the  25 project executive on this client, and he is</p>	<p style="text-align: right;">Page 1180</p> <p>1 A Failure to address these result in both a  2 dissatisfied client and a bad financial condition  3 ultimately for both parties, client and IBM.  4 Q So these are serious issues for you to be  5 dealing with?  6 A Yes.  7 Q Let's fast forward. If you'd turn to  8 Defendant's Exhibit 21. And we're going to move ahead  9 in time. This is now January of 2007, and the bottom  10 of the page is an e-mail from Keenie McDonald to you  11 and John Shimkus. Who is John Shimkus?  12 A John Shimkus was a vice president of services  13 that was reporting to me dedicated to the WellPoint  14 account.  15 Q And the subject line of Ms. McDonald's e-mail  16 says "transition exec." What was a transition exec?  17 A So within the overall responsibility that we  18 had of delivering a service to this client there's a  19 position called a transition exec. Typically they are  20 involved in either moving the location that we are  21 delivering the service from one location to another,  22 or if we are significantly changing the way that we  23 are delivering that service, we will put the  24 transition exec in place to manage that part of the  25 relationship.</p>

Page 1181	Page 1183
<p>1 Q Would you please read for us Ms. McDonald's</p> <p>2 e-mail to you?</p> <p>3 A "Dave, please help push this. We need this</p> <p>4 guy to start on Monday. What do you and/or I need to</p> <p>5 do to make this happen, literally starting Monday. We</p> <p>6 continue to lose valuable time. See --" ST is an</p> <p>7 abbreviation for same time in communication</p> <p>8 technology "-- below from John. Thanks."</p> <p>9 And then there's a message that is Shimkus at</p> <p>10 IBM, that's John Shimkus, "Castelluccio was working an</p> <p>11 issue on plan type for Michael Jones. This is a big</p> <p>12 issue for Mike Jones so Jim needs to solve it before</p> <p>13 we can close on him and get him started. I pinged Jim</p> <p>14 for status but no response."</p> <p>15 Q So "same time", that's like instant messaging?</p> <p>16 A Correct.</p> <p>17 Q So that was another way that you would</p> <p>18 communicate amongst yourselves at IBM?</p> <p>19 A Correct.</p> <p>20 Q And as you're reading this e-mail from Ms.</p> <p>21 McDonald, it looks like this is an urgent issue, is</p> <p>22 that correct?</p> <p>23 A Correct. He was fulfilling or putting a</p> <p>24 leader in for the transition exec.</p> <p>25 Q And your response to Ms. McDonald at the top</p>	<p>1 her around the time she took over in this new role?</p> <p>2 A I did.</p> <p>3 Q Did you reach out to her or did she reach out</p> <p>4 to you?</p> <p>5 A I reached out to her.</p> <p>6 Q And do you remember if you met in person or</p> <p>7 over the phone?</p> <p>8 A I think the communication started via e-mail,</p> <p>9 and then was followed up by face-to-face meetings.</p> <p>10 Q And what did you guys talk about?</p> <p>11 A Basically I needed to take her through the</p> <p>12 status of our business, the pendencies I had on her</p> <p>13 and her team to perform to serve our clients, and then</p> <p>14 I escalated what were some of the most challenged or</p> <p>15 difficult issues we were dealing with at that point in</p> <p>16 time.</p> <p>17 Q And thinking back to that time frame of</p> <p>18 February 2007, what were the challenging issues you</p> <p>19 were facing?</p> <p>20 A There were a set of contracts that were not</p> <p>21 performing, WellPoint being one of them.</p> <p>22 Q And did you have any discussion about</p> <p>23 personnel issues?</p> <p>24 A Yes. During that initial conversation I</p> <p>25 shared with Joanne that I had a long-standing</p>
Page 1182	Page 1184
<p>1 of the page, you say, "I'm tracking down Jim to get</p> <p>2 this closed."</p> <p>3 Did you see it as your responsibility to track</p> <p>4 down Mr. Castelluccio to make sure he was doing his</p> <p>5 job?</p> <p>6 A It's not the type of thing that I would say is</p> <p>7 my core responsibility. We have professional</p> <p>8 accountability to each other to get things done, but</p> <p>9 in this condition it was being escalated to me to</p> <p>10 address.</p> <p>11 Q And it was being escalated to you because why?</p> <p>12 A It was not being addressed in a timely manner.</p> <p>13 Q Do you remember Joanne Collins-Smee replacing</p> <p>14 Kelton Jones as the general manager of ITD Americas?</p> <p>15 A Yes, I do.</p> <p>16 Q And do you have a recollection of the time</p> <p>17 frame of when that happened?</p> <p>18 A Approximately February 2007.</p> <p>19 Q And how did you learn about that change in</p> <p>20 leadership?</p> <p>21 A I suspect my boss at the time, Bob Zapfel,</p> <p>22 communicated the change to me.</p> <p>23 Q Had you worked with Ms. Collins-Smee before?</p> <p>24 A I had not.</p> <p>25 Q And did you have an opportunity to speak with</p>	<p>1 escalation into her predecessor, Kelton Jones, that</p> <p>2 there were performance concerns in Jim Castelluccio's</p> <p>3 ability to manage in the position that he was in.</p> <p>4 Q Did you express to Ms. Collins-Smee that you</p> <p>5 wanted to have Mr. Castelluccio replaced as the VP of</p> <p>6 public sector?</p> <p>7 A Correct.</p> <p>8 Q What was her response?</p> <p>9 A She committed to look into the situation, and</p> <p>10 get her own assessment and determination on whether</p> <p>11 change was warranted.</p> <p>12 Q Would you turn to Defendant's Exhibit number</p> <p>13 28. I want to focus on the second e-mail in the</p> <p>14 string on the first page. It's an e-mail from you to</p> <p>15 Ms. Collins-Smee on February 11th. Do you remember if</p> <p>16 you sent this e-mail before or after you had spoken</p> <p>17 with Ms. Collins-Smee?</p> <p>18 A My belief is this is my initial communication</p> <p>19 to Joanne.</p> <p>20 Q And could you please read your e-mail, the</p> <p>21 first two paragraphs?</p> <p>22 A "WellPoint is my largest most important and</p> <p>23 most challenged client/contract. In the near future I</p> <p>24 would like to take you through our opportunities and</p> <p>25 challenges. In the short-term I would appreciate your</p>

<p style="text-align: right;">Page 1185</p> <p>1 help getting an executive transition manager on  2 WellPoint. It has been open for months, and in the  3 interest of straight talk Jim Castelluccio and Kelton  4 have not come up with a quality candidate."  5 Q Is this executive transition manager issue the  6 same one that we saw in the prior e-mails from  7 January?  8 A Yes, it is.  9 Q So it still isn't filled, almost three weeks  10 later?  11 A Correct.  12 Q And in that second paragraph you say "In the  13 interest of straight talk Jim Castelluccio and Kelton  14 have not come up with quality candidate." What did  15 you mean by "in the interest of straight talk"?  16 A Just to be very clear and blunt about the  17 challenge of the situation.  18 Q If you'll turn to the next exhibit, Exhibit 29  19 this is also a fairly lengthy e-mail, not really a  20 string, multiple e-mails attached together. I'm going  21 to focus on the first page, but take your time and  22 make sure you are familiar with it.  23 A Okay.  24 Q So this e-mail is -- the top e-mail is from  25 you to Ms. Collins-Smee. It's dated February 13th.</p>	<p style="text-align: right;">Page 1187</p> <p>1 WellPoint, and on the critical need to improve our  2 service delivery and to improve our leadership on the  3 account.  4 Q So at some point Mr. Castelluccio was removed  5 from the vice president of public sector delivery  6 role. Do you recall that occurring?  7 A I do.  8 Q And how did you become aware of it?  9 A Communication from Joanne.  10 Q And did you agree with her pulling him off  11 that role?  12 A I did.  13 Q We've heard testimony already in this case  14 that Miguel Echavarria ultimately took over the vice  15 president role around June of 2007. Do you remember  16 Miguel coming in to take over that role?  17 A I do.  18 Q And how did Miguel do as the vice president of  19 public sector delivery?  20 A Over the course of the year he improved  21 performance, was much more communicative with my  22 management team, and helped address some of the  23 performance and HR concerns or personnel concerns that  24 I had previously escalated.  25 Q We've also heard quite a bit of testimony from</p>
<p style="text-align: right;">Page 1186</p> <p>1 And would you please read the highlighted portion on  2 the screen there of your first paragraph?  3 A "Joanne, the attached note and the other item  4 re-escalated in the WLM --" should have been WLP, an  5 acronym for WellPoint "-- from Keenie are examples of  6 where Jim does not respond or lead. I would like to  7 quickly make a change."  8 Q So what did you mean by "I would like to  9 quickly make a change"?  10 A This is a continued dialogue on my part to  11 communicate at this point to Jim's current manager,  12 Joanne, that I thought a change in leadership was  13 required.  14 Q And she had agreed to review his performance,  15 talk with him and defer on the decision at that point,  16 correct?  17 A Correct.  18 Q And during the month of February did you have  19 any other discussions with Ms. Collins-Smee about Mr.  20 Castelluccio?  21 A I'm sure I did.  22 Q And do you remember generally the nature of  23 those discussions?  24 A They were continued discussions on the themes  25 that we have exchanged here on performance issues, on</p>	<p style="text-align: right;">Page 1188</p> <p>1 several witnesses that Mr. Castelluccio was eventually  2 assigned to serve as the senior DPE on the WellPoint  3 account. Do you remember that happening?  4 A Yes, I do.  5 Q Would you turn to Defendant's Exhibit 45 for  6 me. The bottom of this first page, the only page,  7 there's an e-mail from Ms. Collins-Smee dated March  8 31st, 2007. It's sent to Mr. Castelluccio and to you,  9 and she says, "Dave, Jim. As we discussed, Jim must  10 move to WellPoint as of Monday. We need him to be the  11 acting DPE 100 percent of the time until we put the  12 new WellPoint DPE in on April 16th."  13 Were you involved in the decision to move Mr.  14 Castelluccio to the DPE role at WellPoint?  15 A Yes.  16 Q And what was the rationale for making this  17 assignment?  18 A A couple of factors. One, reducing the scope  19 of responsibility for Jim to a single client gave him  20 a better opportunity to perform and use his talents  21 and experience in that job. Secondly, because he had  22 experience and familiarity with WellPoint from his, at  23 that point in time current role, it would accelerate  24 the potential for positive impact on the client  25 situation.</p>



<p style="text-align: right;">Page 1189</p> <p>1 Q So did you agree with the decision to assign 2 Mr. Castelluccio to the WellPoint account? 3 A Yes, I did. 4 Q So the question that I'm sure many of the 5 jurors are wondering is, if you had had all these 6 concerns with Mr. Castelluccio for the last year, year 7 and a half, in his communication on issues, 8 responsiveness, failure to keep commitments, why would 9 you agree to put him on your largest and most troubled 10 account? 11 A Again, by reducing the scope of the job and 12 focusing an individual, in this case Jim, on a more 13 specific responsibility, we felt it gave him the 14 opportunity to demonstrate and leverage the skills and 15 experience that he had throughout his IBM career. 16 Q Focusing back on the e-mail from Ms. 17 Collins-Smee, she says that he will be the acting DPE 18 100 percent of the time. What did you understand that 19 to mean? 20 A The term "acting" implies that it is an 21 interim position. The reference to 100 percent 22 implies the individual is dedicated to that 23 responsibility through that period. 24 Q Do you know if Mr. Castelluccio had any other 25 responsibilities in addition to servicing the</p>	<p style="text-align: right;">Page 1191</p> <p>1 one with Boxer and one with Dave McDonald, they both 2 jumped on me re our lack of delivery leadership and 3 Jim's lack of real involvement. Dave McDonald 4 literally said, I don't even waste my time trying to 5 contact Jim anymore." 6 Q Who was Boxer? 7 A Mark Boxer was the CIO for WellPoint. 8 Q And Dave McDonald? 9 A Dave McDonald was the VP of infrastructure 10 reporting to Mark Boxer. 11 Q What was your reaction to receiving an e-mail 12 like this from Ms. McDonald saying that Mr. Boxer and 13 Mr. McDonald are jumping on her because of the lack of 14 delivery leadership and Jim's lack of real 15 involvement? 16 A It was evidence or symptomatic of some of the 17 same performance concerns that I had experienced, and 18 indicated that the communications was not happening 19 between Jim and the client, and that they had 20 determined that there was not benefit to working 21 through Jim at this point in time. 22 Q And so despite the fact that IBM had narrowed 23 Mr. Castelluccio's focus to just one account, 24 WellPoint, you continued to see the same issues that 25 you had been seeing the last year and a half with</p>
<p style="text-align: right;">Page 1190</p> <p>1 WellPoint account at this time? 2 A At this point in time and thereafter Joanne 3 had assumed the broader responsibilities and taken 4 those on directly, and Jim's direction and 5 responsibility was exclusive to WellPoint. 6 Q So when issues arose on some of the other 7 public sector accounts, not the WellPoint account, but 8 other accounts, would you reach out to Jim 9 Castelluccio on those accounts? 10 A No. 11 Q Who would you reach out to? 12 A To Joanne. 13 Q And what about your managers, your vice 14 presidents, would they have reached out to Jim 15 Castelluccio? 16 A I can't comment on everything that they did. 17 I can only say that if they escalated things to me, 18 those were directed to Joanne. 19 Q Turn to Defendant's Exhibit 57. This is a 20 June 1, 2007 e-mail from Ms. McDonald to Robert 21 Zapfel, Joanne Collins-Smee and to you. Would you 22 please read the highlighted portion of the e-mail to 23 the jury. 24 A "This temporary approach with Jim Castelluccio 25 is not working. On two separate calls this morning,</p>	<p style="text-align: right;">Page 1192</p> <p>1 regard to his performance? 2 A Correct. 3 Q And do you know if these performance issues 4 were ever addressed with Mr. Castelluccio? 5 A I can't comment from this point forward, only 6 the prior. 7 Q You had addressed them with him before, but 8 when he was serving as the DPE at WellPoint you didn't 9 have any specific conversations with him where you 10 raised these issues? 11 A I did not. 12 Q At some point we know that Mr. Castelluccio 13 was removed from the DPE role at WellPoint and Gordon 14 Crawford came in. Do you remember that happening? 15 A I do. 16 Q Had you worked with Mr. Crawford before? 17 A I had not. 18 Q Did you interview him for this position? 19 A I did. 20 Q And did you know how old he was at the time? 21 A I did not. 22 Q Would it have mattered? 23 A It would have not. 24 Q Why was Mr. Crawford selected to serve as the 25 DPE on WellPoint?</p>

<p style="text-align: right;">Page 1193</p> <p>1 A He had a strong track record on service 2 delivery management, and managing large and complex 3 contracts and programs similar to the contract and 4 attributes that we had at WellPoint. 5 Q And how did he do when he took over as the DPE 6 at WellPoint? 7 A He performed very well. The client 8 satisfaction significantly improved. The quality of 9 service significantly improved, and the business or 10 financial management of the contract significantly 11 improved. 12 Q When Mr. Crawford came in and took over the 13 DPE role, Mr. Castelluccio then was told to focus on 14 finding another job or another project at IBM and he 15 had six months to do so. Did he come to you at any 16 point during that six months and ask you if you had 17 any job lead for him or any projects he could work on? 18 A Not to my recollection. 19 MR. DUFFIELD: No further questions, Your 20 Honor. 21 THE COURT: Mr. Carta? 22 MR. CARTA: Would this be a time to take 23 a break? 24 THE COURT: Well, ladies and gentlemen, 25 maybe we should take a break now until about five</p>	<p style="text-align: right;">Page 1195</p> <p>1 that business? 2 A There were a series of executives involved 3 with the engagement. I was one of them. 4 Q Were you the lead on that team? 5 A Could you be more specific? 6 Q Well, describe to the jurors what your role 7 was. 8 A So at that point in time I was the vice 9 president of a set of industries, which healthcare was 10 one of them. WellPoint, the contract was pursued and 11 closed during that point in time. I had 12 responsibility for sales and account management, and I 13 had a team of executives that ran the sales function 14 under my direction. 15 Q So you were the principal salesperson 16 responsible for bringing in the WellPoint account? 17 A There is a principal salesperson that led the 18 sale. That executive worked for me. 19 Q And that executive reported up to you? 20 A Correct. 21 Q So that was your responsibility, what he did? 22 A Correct. 23 Q Was it a he or she? 24 A It was a she. 25 Q So you were also responsible for overseeing</p>
<p style="text-align: right;">Page 1194</p> <p>1 minutes before 12. We'll take a break until about 12, 2 12:05. 3 (Jurors excused) 4 THE COURT: See you here at 12:05. 5 MR. DUFFIELD: Or five minutes to 12 I 6 thought you said. 7 (Recess taken from 11:44 a.m. to 11:59 a.m.) 8 THE COURT: Mr. Carta. 9 MR. CARTA: Thank you. 10 11 CROSS-EXAMINATION BY MR. CARTA: 12 13 Q Almost good afternoon, Mr. Liederbach. 14 A Good afternoon. 15 Q I'm Mark Carta and I represent James 16 Castelluccio. 17 I'd like to ask some preliminary questions 18 about your role in connection with the WellPoint 19 account. The WellPoint account went into effect in 20 July of 2005, is that right? 21 A That's right. 22 Q Contract went into effect? 23 A Correct. 24 Q And am I correct that you were the IBM 25 executive who led them in the engagement team to land</p>	<p style="text-align: right;">Page 1196</p> <p>1 the pricing on the WellPoint contract, isn't that 2 correct? 3 A That's correct. 4 Q And you were responsible for working with the 5 legal team in terms of the legal terms in the contract 6 that was signed between IBM and WellPoint? 7 A Correct. 8 Q And isn't it true that the profitability of 9 the WellPoint contract directly impacted your career 10 at IBM? 11 A Correct. 12 Q In fact, I think a moment ago you introduced 13 an exhibit that said WellPoint was your largest most 14 important account. Do you remember that exhibit? 15 A I do. 16 Q And that was something that you pointed out to 17 Ms. Collins-Smee, is that correct? 18 A That's correct. 19 Q Exhibit 21. 20 Would you please take a moment and review this 21 e-mail exchange. 22 A I'm sorry, it's Exhibit 21? 23 Q Yes. It should be -- I'm not sure what binder 24 you have in front of you. It's Plaintiff's 21. It's 25 on the screen, but I'll get you a hard copy.</p>

<p style="text-align: right;">Page 1197</p> <p>1 A Thank you.</p> <p>2 Q Mr. Liederbach, what was Mr. Boxer's role,</p> <p>3 again, at WellPoint?</p> <p>4 A He was the CIO for WellPoint.</p> <p>5 Q So he was in charge of all of their computer</p> <p>6 operation, all of their information technology?</p> <p>7 A Correct.</p> <p>8 Q And isn't it true that Mr. Boxer insisted that</p> <p>9 you be removed from the WellPoint account?</p> <p>10 A Correct.</p> <p>11 Q And in this instance when he learned that you</p> <p>12 had possibly been in the background, he demanded of</p> <p>13 Keenie McDonald that you have no involvement</p> <p>14 whatsoever with the account, isn't that correct?</p> <p>15 A Are you referencing to the document?</p> <p>16 Q Yes, I am.</p> <p>17 A Yes.</p> <p>18 Q That is correct.</p> <p>19 Do you have a single e-mail in which Mr. Boxer</p> <p>20 states that he doesn't want Mr. Castelluccio working</p> <p>21 on the WellPoint account directly or indirectly?</p> <p>22 A Do I have an e-mail like that? I do not.</p> <p>23 Q Are you aware of such an e-mail where Mr.</p> <p>24 Boxer takes an unequivocal position he doesn't want</p> <p>25 Mr. Castelluccio working on this account the way he</p>	<p style="text-align: right;">Page 1199</p> <p>1 Q Would you like me to repeat the question?</p> <p>2 A Please.</p> <p>3 Q Sure. My recollection is that Ms.</p> <p>4 Collins-Smee identified two IBM employees that she</p> <p>5 thought were pivotal in turning around the IBM</p> <p>6 account, and the first one I remember her identifying</p> <p>7 is Mike Morin, and I'm asking you if you would agree</p> <p>8 with that assessment?</p> <p>9 A I would not agree with that assessment as</p> <p>10 stated.</p> <p>11 Q And why not?</p> <p>12 A Because at that point in time when Mike was on</p> <p>13 the account we still had material client satisfaction,</p> <p>14 service delivery, business management issues on the</p> <p>15 WellPoint account, so I would not characterize it as</p> <p>16 he turned around the account.</p> <p>17 Q I didn't mean to attribute it all to him. I</p> <p>18 was just -- did you believe that Mike Morin performed</p> <p>19 successfully on the WellPoint account?</p> <p>20 A In light of what I just said about the</p> <p>21 condition of the account, I would not say Mike was</p> <p>22 successful on the WellPoint account. Again, pointing</p> <p>23 to, we had service delivery issues, we had client</p> <p>24 satisfaction issues, we had financial performance</p> <p>25 issues during his tenure.</p>
<p style="text-align: right;">Page 1198</p> <p>1 did with you?</p> <p>2 A I have not.</p> <p>3 Q You're not aware of any such document?</p> <p>4 A Correct.</p> <p>5 Q Ms. Collins-Smee testified that Mike Morin was</p> <p>6 one of the two key IBM executives to help turn around</p> <p>7 the WellPoint account. Do you agree with that?</p> <p>8 A Could you rephrase it?</p> <p>9 Q Sure. You know Mike Morin was the second DPE</p> <p>10 on the WellPoint account?</p> <p>11 A Yes.</p> <p>12 Q Dave Cartez being the first?</p> <p>13 A Correct.</p> <p>14 Q And Ms. Collins-Smee testified that Mike Morin</p> <p>15 was one of the, in her opinion, two key employees to</p> <p>16 turn around the WellPoint account from its early --</p> <p>17 MR. DUFFIELD: Objection, Your Honor. I</p> <p>18 think he's mischaracterizing Ms. Collins-Smee's</p> <p>19 testimony. I don't remember her testifying to that.</p> <p>20 THE COURT: All right, you know, we have</p> <p>21 an intelligent witness, and I think he's able to</p> <p>22 respond to the question. If it's mischaracterized I</p> <p>23 think he'll say so.</p> <p>24 You may proceed.</p> <p>25 BY MR. CARTA:</p>	<p style="text-align: right;">Page 1200</p> <p>1 Q So in your opinion he was not successful on</p> <p>2 the account.</p> <p>3 You talked for a moment earlier about the</p> <p>4 transition management, who was the overall transition</p> <p>5 manager, and I think there was some e-mails relating</p> <p>6 to Mr. Jones, Mike Jones?</p> <p>7 A Correct.</p> <p>8 I'm listening, I apologize. Are you directing</p> <p>9 me somewhere.</p> <p>10 Q Yes. I'm just asking if you remember</p> <p>11 testifying about the fact that Mr. Jones had been</p> <p>12 identified as a possible person to perform the role of</p> <p>13 a transition manager on the overall -- on the</p> <p>14 WellPoint account?</p> <p>15 A Yes, sir, I recall that.</p> <p>16 Q And one of the e-mails that you were just</p> <p>17 asked about indicated that Mr. Jones ultimately did</p> <p>18 not accept the position.</p> <p>19 A Correct.</p> <p>20 Q And Mr. Jones was from outside the delivery</p> <p>21 organization, if you recall, is that correct?</p> <p>22 A To be candid, I don't remember where he was</p> <p>23 from. I do remember him being a candidate.</p> <p>24 Q Do you remember that Mr. Castelluccio was able</p> <p>25 to get the approval from Mr. Jones to come in to work</p>



Page 1201	Page 1203
<p>1 on WellPoint from the outside organization in which he</p> <p>2 was involved?</p> <p>3 A I do remember that he was a candidate. I</p> <p>4 apologize, I don't remember where he was, where his</p> <p>5 current position was, when you say outside the</p> <p>6 organization.</p> <p>7 Q And do you recall that at some point in time</p> <p>8 Mr. Jones, Mike Jones, just decided he plain didn't</p> <p>9 want to be involved in WellPoint and didn't want the</p> <p>10 job, do you recall that?</p> <p>11 A I don't recall that. I do recall that he was</p> <p>12 a candidate. I do recall that there was what was</p> <p>13 discussed a plan type, which is a form of compensation</p> <p>14 payment structure that he had indicated he wanted. I</p> <p>15 don't recall what was the reason that Mike Jones</p> <p>16 ultimately wasn't selected or didn't become the</p> <p>17 transition manager.</p> <p>18 Q You would agree with me that if an employee</p> <p>19 just decided unilaterally that he did not want to</p> <p>20 become involved in WellPoint, that Mr. Castelluccio</p> <p>21 had no way to force him to become involved in</p> <p>22 WellPoint, isn't that correct?</p> <p>23 A Yeah, I agree, he does not have the ability to</p> <p>24 force an employee into a job.</p> <p>25 Q And let's stay on the transition manager</p>	<p>1 A Again, there was a lot of people on the</p> <p>2 account, so I -- I know Julie's name. I don't know</p> <p>3 her specific role.</p> <p>4 Q And do you recall that Julie's performance on</p> <p>5 the WellPoint account was -- she made an important</p> <p>6 contribution?</p> <p>7 A Again, to be straight with you, I don't recall</p> <p>8 her specific role, so I can't testify to the fact that</p> <p>9 she was a contributor.</p> <p>10 Q And how about John Halloran, do you recall</p> <p>11 that John Halloran ran the day-to-day management on</p> <p>12 the WellPoint account?</p> <p>13 A Again, I know the name. As I think you're</p> <p>14 aware, I had responsibility for 50 clients and a whole</p> <p>15 bunch of sales pursuits. This is one contract among</p> <p>16 the broader responsibility, so I am not familiar with</p> <p>17 every employee in the contract itself.</p> <p>18 Q I completely understand.</p> <p>19 Do you happen to remember John Halloran as the</p> <p>20 person who was running the day-to-day management on</p> <p>21 the WellPoint account?</p> <p>22 A So I remember the name, I know he worked on</p> <p>23 the account. I'm not familiar with his specific role</p> <p>24 or performance.</p> <p>25 Q Do you have a recollection of whether Mr.</p>
Page 1202	Page 1204
<p>1 position. That position was ultimately filled by Mark</p> <p>2 Franzese, isn't that correct?</p> <p>3 A Correct.</p> <p>4 Q And I hope I'm pronouncing it correct. Is</p> <p>5 that correct?</p> <p>6 A Mark Franzese.</p> <p>7 Q Franzese, thank you.</p> <p>8 And Mr. Franzese was the second person that --</p> <p>9 my recollection is that he was the second person Ms.</p> <p>10 Collins-Smee identified as being pivotal in turning</p> <p>11 around WellPoint. Would you agree with that</p> <p>12 assessment?</p> <p>13 A I do agree that Mark was pivotal in turning</p> <p>14 around the contract.</p> <p>15 Q And you know, don't you, that both Mark</p> <p>16 Franzese and Mike Morin were brought into the</p> <p>17 WellPoint account by Mr. Castelluccio when he was VP</p> <p>18 of public sector, isn't that right?</p> <p>19 A Yes.</p> <p>20 Q And do you recall a Julie Taylor?</p> <p>21 A The name -- I recall the name. I can't speak</p> <p>22 to her specific responsibility.</p> <p>23 Q Would it refresh your recollection if I</p> <p>24 indicated that she worked with Mark Franzese on the</p> <p>25 transition on the WellPoint account?</p>	<p>1 Castelluccio brought in both Mr. Halloran as well as</p> <p>2 Julie Taylor, do you have a recollection of that?</p> <p>3 A I did not.</p> <p>4 Q And how about Regina Urkuart, U-R-K-U-A-R-T, I</p> <p>5 think is how you pronounce her name. Didn't she run</p> <p>6 the mainframe towers on the WellPoint account?</p> <p>7 A I do remember Regina. I do remember her role</p> <p>8 on the mainframe tower.</p> <p>9 Q And you remember she performed quite</p> <p>10 admirably, don't you?</p> <p>11 A I agree she was a strong contributor.</p> <p>12 Q And she was also brought on the WellPoint</p> <p>13 account by Mr. Castelluccio, isn't that correct?</p> <p>14 A It was under his responsibility, so I will</p> <p>15 agree that he would have brought her in.</p> <p>16 Q And he did that in his capacity as vice</p> <p>17 president of public sector?</p> <p>18 A I don't know the timing of whether it was vice</p> <p>19 president of public sector or it's when he was the</p> <p>20 vice president on WellPoint.</p> <p>21 Q Okay. But there's no question that he brought</p> <p>22 her in?</p> <p>23 A I'm not the right person to answer that</p> <p>24 question, sir. Because his -- I don't have visibility</p> <p>25 on all of Jim's personnel selections.</p>

<p style="text-align: right;">Page 1205</p> <p>1 Q But earlier you were raising an issue about 2 the failure to fill the role with Mike Jones, weren't 3 you? 4 A Correct. 5 Q As part of your direct examination? 6 A Correct. 7 Q But you don't really know what was going on at 8 that level across the board, do you? 9 A I'm familiar with the situation with Mike 10 Jones. 11 Q That one situation you're familiar with? 12 A Correct. 13 Q And in that one situation Mike Jones 14 ultimately said he didn't want the job and he was -- 15 and Mr. Castelluccio brought in Mark Franzese who you 16 admitted did an admirable job? 17 A I agree, Mark did an admirable job. 18 Q And that's one of the major responsibilities 19 of a vice president, isn't it, to seek out the most 20 skilled talent within IBM and to bring them on to a 21 job like WellPoint where there are real problems? 22 A Correct, resource management is a critical 23 role. 24 Q There is a series of e-mails that you went 25 through with counsel concerning lack of</p>	<p style="text-align: right;">Page 1207</p> <p>1 A Yes, it was one that was initially raised. 2 Q And the beginning of this e-mail, as you noted 3 earlier, says, "Please do not forward." 4 Am I right that your concern was that Mr. 5 Jones was going to forward this to Mr. Castelluccio so 6 that Mr. Castelluccio would then have an opportunity 7 to explain what had happened, is that why you said 8 "Please do not forward"? 9 A The reason why I said "do not forward" was 10 because I wanted to have the conversation directly 11 with Kelton to understand his point of view on Jim's 12 performance and whether there were situations as 13 referenced in the e-mail that might be outside of the 14 scope of work that were impacting performance. So it 15 was out of respect for Jim that Kelton and I had a 16 chance to speak. I didn't -- you asked the question, 17 was I concerned he would forward it to Jim. The 18 answer is no, I didn't have a concern of it being 19 forwarded to Jim. Ultimately Jim and I discussed the 20 situation. 21 Q When you say "Please do not forward," you're 22 asking Mr. Jones not to forward it to Mr. 23 Castelluccio, isn't that correct? 24 A That's not correct. 25 Q Who?</p>
<p style="text-align: right;">Page 1206</p> <p>1 responsiveness. Let's start with Exhibit 210. 2 A I apologize, my document only goes up to 113. 3 Yes, sir. 4 Q In this e-mail you identify -- can you 5 identify this as an e-mail that you sent to Kelton 6 Jones on April 30th, 2006? 7 A Yes, it is. 8 Q And in your e-mail you indicate to Mr. Jones 9 that you've attached another e-mail from Chris 10 Nicoletti. You were just talking about earlier part 11 of this document from Chris Nicoletti, right? 12 A Correct. 13 Q And you used Mr. Nicoletti's complaint to you 14 as an example of Mr. Castelluccio's responsiveness, 15 isn't that correct? 16 A Correct. 17 Q And that was the point of this e-mail to 18 Kelton Jones, to point out to him that as an example 19 of where Mr. Castelluccio had not been responsible. 20 Do you think that's the point of the this e-mail? 21 A It was an example, yes. 22 Q And it was the example that you chose as your 23 first example when you were presenting direct evidence 24 to the jury, isn't that right, a complaint from Mr. 25 Nicoletti?</p>	<p style="text-align: right;">Page 1208</p> <p>1 A It was a general statement, don't forward the 2 e-mail until I have a chance to talk to Kelton Jones 3 so I had complete context for the situation. 4 Q Oh, I'm sorry, I'm perplexed. Please do not 5 forward to whom? What was your request? Are you 6 saying -- what was your request, please do not forward 7 to whom? 8 A Please do not forward. 9 Q To whom? 10 A Anyone. 11 Q To anyone. 12 A Correct. 13 Q Anyone certainly including Mr. Castelluccio? 14 A Anyone. 15 Q And it's your testimony that you asked him not 16 to forward it to Mr. Castelluccio out of respect for 17 Mr. Castelluccio, is that what you just said? 18 A The reason why I asked for the e-mail not to 19 be forwarded was to give me the opportunity to talk to 20 Kelton Jones to understand the full context of the 21 situation with Jim. 22 Q And you believe that Mr. Jones and you would 23 not have been able to have an opportunity to have a 24 candid and frank discussion if he had had a chance to 25 talk to Mr. Castelluccio first, is that your position?</p>

<p style="text-align: right;">Page 1209</p> <p>1 A No, it's not my position.</p> <p>2 Q Well, how does not forwarding this to Mr.</p> <p>3 Castelluccio help you have a candid and frank</p> <p>4 discussion with Mr. Jones?</p> <p>5 A I apologize. My statement was I had requested</p> <p>6 the e-mail not be forwarded to anybody until he and I</p> <p>7 had a chance to speak. My intention on that was to</p> <p>8 ensure I had full context from his manager of what was</p> <p>9 the current professional situation with Jim and if</p> <p>10 there were extenuating circumstances outside of work</p> <p>11 that I wasn't aware of.</p> <p>12 Q Help me understand that if Mr. Jones had</p> <p>13 forwarded this to Mr. Castelluccio, how that would</p> <p>14 have prevented you from having a candid discussion</p> <p>15 with Mr. Jones? I'm just not following that.</p> <p>16 A I apologize, I'm not following the question.</p> <p>17 I just asked that it not be forwarded. It's not more</p> <p>18 simple or complicated than that. I asked that it not</p> <p>19 be forwarded.</p> <p>20 Q And I think the reason you said that you asked</p> <p>21 it not be forwarded is so that you could have a candid</p> <p>22 conversation, my word, candid conversation with Mr.</p> <p>23 Jones, is that right?</p> <p>24 A I asked that the e-mail not be forwarded so</p> <p>25 that he and I could speak. And I apologize if I'm not</p>	<p style="text-align: right;">Page 1211</p> <p>1 In fact Mr. Nicoletti e-mailed Mr. Castelluccio at</p> <p>2 9:00 p.m. in the evening, and before noon the next day</p> <p>3 Mr. Castelluccio sent this response, isn't that</p> <p>4 correct?</p> <p>5 A The escalation from Chris to Jim was on April</p> <p>6 25th at 6:53 p.m.</p> <p>7 Q That was the first e-mail, but this was the</p> <p>8 one that you cited when you talked to Mr. Jones about</p> <p>9 how Mr. Castelluccio was not responsive, isn't that</p> <p>10 correct?</p> <p>11 A No, it's not correct. It is the collection of</p> <p>12 the e-mail. It's the escalation starting on April</p> <p>13 25th and the response coming the 30th.</p> <p>14 Q And this was one of those, right?</p> <p>15 A I'm sorry?</p> <p>16 Q Mr. Nicoletti's e-mail of April 28th was one</p> <p>17 of those e-mails?</p> <p>18 A Yes, but it is referring to the initial</p> <p>19 escalation that is on the page behind what you are</p> <p>20 asking me to look at. If you want to scroll down, you</p> <p>21 scroll down what's on the screen, you'll see the</p> <p>22 initial escalation is April 25th at 6:53 p.m.</p> <p>23 Q I'd like to focus on Mr. Castelluccio's</p> <p>24 response before noon on the next day. Mr.</p> <p>25 Castelluccio says, "Chris, responding to Mr.</p>
<p style="text-align: right;">Page 1210</p> <p>1 giving you your answer, but it's...</p> <p>2 Q And this e-mail, again, is April 30, 2006?</p> <p>3 A Correct.</p> <p>4 Q Exhibit 127, please. Exhibit 127, can you</p> <p>5 identify this as an e-mail you received from Mr.</p> <p>6 Nicoletti later on the same day, April 30, 2006.</p> <p>7 Have you had a chance to look at it?</p> <p>8 A Yes.</p> <p>9 Q And this is an e-mail that Mr. Nicoletti sent</p> <p>10 to you the same day, April 30, 2006, isn't that right?</p> <p>11 A That's correct.</p> <p>12 Q And in his e-mail Mr. Nicoletti updates you on</p> <p>13 the fact that he, in fact, did receive a response from</p> <p>14 Mr. Castelluccio. Do you see that?</p> <p>15 A Yes.</p> <p>16 Q And am I correct that Mr. Nicoletti's e-mail,</p> <p>17 Mr. Nicoletti e-mailed Mr. Castelluccio on April 28th,</p> <p>18 2006, at 9:00 p.m.? I think if you look down at the</p> <p>19 bottom of that page you'll see that.</p> <p>20 A Correct.</p> <p>21 Q And Mr. Castelluccio's response is the next</p> <p>22 day, April 29th, before noon, is that correct?</p> <p>23 A Correct.</p> <p>24 Q So you said earlier that you think it's</p> <p>25 appropriate to respond to an e-mail within 24 hours.</p>	<p style="text-align: right;">Page 1212</p> <p>1 Nicoletti. I apologize for not responding as</p> <p>2 promised. It was shortly after my discussion with</p> <p>3 Dave T that we experienced a major outage at WellPoint</p> <p>4 California site." Is that right, the WellPoint CA</p> <p>5 site is California site?</p> <p>6 A Right.</p> <p>7 Q "That tied me up for the next few days. In</p> <p>8 fact we are on weekend status calls with the client as</p> <p>9 we implement our recovery plan. I did ask for an</p> <p>10 update from my team on the RA and will review it this</p> <p>11 weekend and respond."</p> <p>12 Do you see that was Mr. Castelluccio's</p> <p>13 explanation of where he was?</p> <p>14 A Yes.</p> <p>15 Q He was tied up in a major outage with respect</p> <p>16 to the California location from WellPoint, isn't that</p> <p>17 right?</p> <p>18 A Correct.</p> <p>19 Q And this response that you get -- and I think</p> <p>20 to be fair, I think that came in later on the same day</p> <p>21 as you e-mailed Mr. Jones, but did you correct your</p> <p>22 impression that you left with Mr. Jones that, in fact,</p> <p>23 Mr. Castelluccio did respond and that he responded</p> <p>24 explaining what he was doing and where he was?</p> <p>25 A The conversation was -- with Kelton was on a</p>

<p style="text-align: right;">Page 1213</p> <p>1 broader set of circumstances in terms of  2 responsiveness with the escalation of Chris being one  3 of those. The escalation started as documented in the  4 e-mail that you've asked me to look at on the 25th of  5 April.  6 Q So let me try my question again. Did you  7 clarify for Mr. Jones that hours after you'd sent him  8 this as an example of Mr. Castelluccio's not  9 responsiveness, Mr. Nicoletti actually told you that,  10 in fact, Jim had responded and gave an explanation of  11 what he was doing? Yes or no, did you give Mr. Jones  12 that additional information?  13 A I don't recall whether I would have or not.  14 Q Is there any e-mail that indicated that you  15 did, that you're aware of?  16 A Not to my knowledge.  17 Q Exhibit 133, please.  18 And I think you've also cited this on your  19 direct examination. Is this an e-mail that you sent  20 to Joanne Collins-Smee in February of 2007?  21 A Yes, it is.  22 Q And am I correct that in your e-mail to Ms.  23 Collins-Smee, again you use as an example, quote,  24 where Jim does not respond or lead, the original  25 e-mail from Mr. Nicoletti?</p>	<p style="text-align: right;">Page 1215</p> <p>1 was where we started a moment ago. And if you look at  2 the e-mail on page 2 from Mr. Nicoletti -- again, Mr.  3 Nicoletti was working for you, he's one of your  4 executives?  5 A That's correct.  6 Q And Mr. Nicoletti is asking Jim, quote, I want  7 to confirm that we are still on track to reduce the  8 resources on WellPoint in the June resource action in  9 line with what we agreed to in the Palisades meeting.  10 Do you see that?  11 A I do.  12 Q And this is the resource action that was going  13 on in the April through June time frame, isn't that  14 correct?  15 A That's correct.  16 Q And your executive is asking Jim specifically,  17 if you go down to the next paragraph, about six,  18 quote, resources that are supposed to be taken out by  19 June, is that right?  20 A I apologize, which paragraph?  21 Q I'm sorry, the highlighted sentence in the  22 second paragraph, sir.  23 A Correct.  24 Q And what is this resources? We're talking  25 about people, right?</p>
<p style="text-align: right;">Page 1214</p> <p>1 A Correct.  2 Q And did you disclose to Ms. Collins-Smee  3 months later when you knew what had happened, did you  4 disclose to her that Mr. Castelluccio had, in fact,  5 responded almost immediately to Mr. Nicoletti's April  6 28th e-mail?  7 A I doubt I would have with the reason being the  8 escalation was on April 25th. To get a response on  9 the 30th, even if it was associated with the second  10 escalation, would not have changed my opinion in terms  11 of responsiveness.  12 Q So it's your opinion that even his response on  13 the 28th in your judgment was inadequate?  14 A Correct.  15 Q And it was so inadequate that you didn't feel  16 the correct thing to do was to point -- to tell the  17 whole story to Ms. Collins-Smee, isn't that correct?  18 A I'm sorry, your question is?  19 Q Sure. You did not trouble yourself to point  20 out to Ms. Collins-Smee that, in fact, Mr.  21 Castelluccio had responded on the 29th to the last  22 e-mail in the chain from Mr. Nicoletti, isn't that  23 correct?  24 A Correct, I did not.  25 Q Let's go back to Exhibit 210. I think that</p>	<p style="text-align: right;">Page 1216</p> <p>1 A Correct.  2 Q So at this point in time the resource action  3 was still ongoing and Mr. Castelluccio is being asked  4 to reduce the number of people on the WellPoint  5 account by 60, am I reading this correctly?  6 A Yes, you are.  7 Q And this was sent to Mr. Castelluccio in his  8 capacity as vice president of public sector, wasn't  9 he?  10 A That's correct.  11 Q I'm not good at dates, but what's the date of  12 this? This is April 25th, is that right, April 25th,  13 2006?  14 A Yes, that's the date on it.  15 Q And what was the date that Ms. Collins-Smee  16 and you testified that Mr. Castelluccio was supposed  17 to be a hundred percent on WellPoint, April 1st?  18 A I believe this is 2006. I believe what you're  19 referring to is 2007, a year later.  20 Q Okay, you could be right.  21 Okay, let's look at Exhibit 53. I think it's  22 in the other book. Take a second. Take your time.  23 Can you confirm this is an exchange of e-mails  24 between you and Ms. Collins-Smee?  25 A Correct.</p>

Page 1217	Page 1219
<p>1 Q You sent this e-mail?</p> <p>2 A Yes, sir.</p> <p>3 Q And one of the things you ask Ms. Collins-Smee</p> <p>4 is when Mr. Echavarria can start as VP of public</p> <p>5 sector.</p> <p>6 A Correct.</p> <p>7 Q And your e-mail is dated May 27th, 2007?</p> <p>8 A I believe it's April 27th, 2007.</p> <p>9 Q I'm sorry, did I misspeak? I meant to say</p> <p>10 April.</p> <p>11 And she respond that he will not be available</p> <p>12 for approximately another month, not until the end of</p> <p>13 May, is that right?</p> <p>14 A Correct.</p> <p>15 Q And if you recall, Mr. Echavarria did not</p> <p>16 start full-time as vice president of public sector</p> <p>17 until June, isn't that right?</p> <p>18 A I don't recall the specific date.</p> <p>19 Q And here she indicates that Miguel will not be</p> <p>20 able -- or will be yours by the end of May. Was that</p> <p>21 approximately what happened, as best you can recall?</p> <p>22 A I know that was her commitment, and I know</p> <p>23 Miguel took over the position shortly thereafter. I</p> <p>24 don't recall the exact date.</p> <p>25 Q I'd like to go back to Exhibit 133 for a</p>	<p>1 document?</p> <p>2 A One second, I got to go back to that.</p> <p>3 Q Sure.</p> <p>4 A Yes, sir.</p> <p>5 Q My question is, are you familiar with this</p> <p>6 document generally?</p> <p>7 A No, I'm not familiar with this document</p> <p>8 generally.</p> <p>9 Q Have you seen it before?</p> <p>10 A Not to my recollection.</p> <p>11 Q Mr. Castelluccio testified that this was, in</p> <p>12 fact, the plan that he and a team put together for</p> <p>13 addressing the problems identified in the Red Team</p> <p>14 Review. Does that refresh your recollection at all as</p> <p>15 to -- with respect to this document?</p> <p>16 A Not necessarily. It's the level of detail</p> <p>17 that I don't recall being engaged in directly, that</p> <p>18 being the review and discussion of this document.</p> <p>19 Q So that level of detail was -- you were above</p> <p>20 that level of detail?</p> <p>21 A It's not the type of document or meeting that</p> <p>22 I would be in.</p> <p>23 Q That you would be what, I'm sorry?</p> <p>24 A That I would participate in.</p> <p>25 Q Let's look at page 4 of that document, please.</p>
Page 1218	Page 1220
<p>1 moment. Again, Exhibit 133, and when you find it, I'd</p> <p>2 like to direct your attention to the fourth page.</p> <p>3 A Yes, sir.</p> <p>4 Q Who is Mr. Fernandez?</p> <p>5 A Luis Fernandez was the project executive on</p> <p>6 the account. He had responsibility dedicated to</p> <p>7 WellPoint for the service performance and client</p> <p>8 satisfaction on the contract.</p> <p>9 Q And again, he reported directly to you?</p> <p>10 A Correct.</p> <p>11 Q And in this e-mail to you he indicates that no</p> <p>12 action has been taken with respect to having a plan in</p> <p>13 place to address various points he discusses, is that</p> <p>14 correct?</p> <p>15 A Yes.</p> <p>16 Q Exhibit 19, please.</p> <p>17 A 19?</p> <p>18 Q This e-mail is dated September 20th, is that</p> <p>19 right, the e-mail of Exhibit 133?</p> <p>20 A I'm sorry, it's off the screen.</p> <p>21 Q I'm sorry, it's February 13th, 2007, the</p> <p>22 e-mail from Mr. Fernandez to you, which is in the</p> <p>23 fourth page of Exhibit 133.</p> <p>24 A Yes, sir.</p> <p>25 Q Okay. So Exhibit 19, do you recognize this</p>	<p>1 You may or may not know this. Do you have any</p> <p>2 recollection of whether the focus team that was put</p> <p>3 together to address the specific problems of</p> <p>4 WellPoint, whether that was headed by Mr.</p> <p>5 Castelluccio?</p> <p>6 A I would expect that Jim was involved in it.</p> <p>7 Q And in fact you would expect that he would</p> <p>8 have head it, wouldn't you have?</p> <p>9 A Correct.</p> <p>10 Q And do you know that Mr. Fernandez, the one</p> <p>11 who was complaining that there was no plan in his</p> <p>12 earlier e-mail, that, in fact, he was directly</p> <p>13 involved in putting together that plan as well, right?</p> <p>14 A Luis would have been involved in the plan as</p> <p>15 well, yes.</p> <p>16 Q And any plan like this that was put together</p> <p>17 where he was part of the focus group, he would have</p> <p>18 participated in helping come up with the solutions to</p> <p>19 the problems that WellPoint was facing, isn't that</p> <p>20 fair?</p> <p>21 A I would expect that, yes.</p> <p>22 Q My understanding is that there are specific</p> <p>23 procedures at WellPoint -- I'm sorry -- at IBM for</p> <p>24 having additional resources approved on an account.</p> <p>25 Can you go through the procedures that were in place</p>



<p style="text-align: right;">Page 1221</p> <p>1 for having additional resources approved on the 2 WellPoint account? 3 A With any contract there would be a financial 4 budget for the cost on that contract, an amount of 5 resource or people that were associated with the 6 contract, and there are varying levels of approval on 7 managing and changing those numbers. 8 Q And is it fair to say that anything that -- 9 any additional expenditures that were not already 10 approved in the budget on WellPoint had to be approved 11 by you? 12 A Not necessarily, but I would have visibility 13 to significant changes. 14 Q I don't know what that means, visibility. 15 That means you saw it? I don't understand. 16 A That I would in a financial review, business 17 review of the contract, I would be made aware of 18 significant changes. 19 Q You'd be made aware of it. Is it your 20 testimony that you were not the person who needed to 21 approve, let's say, additional personnel being 22 assigned to WellPoint to solve the problems there? 23 A It's a level -- if it was a lower cost or 24 smaller number of people, I might not be needed to 25 approve it. You would have that authority delegated</p>	<p style="text-align: right;">Page 1223</p> <p>1 the delivery project executive. 2 Q So that was a decision that could be made by 3 the DPE and the PE independently, that's your 4 testimony? 5 A Correct. 6 Q In 2006 the accounts for which Mr. 7 Castelluccio was responsible were accounts of which 8 you also had responsibilities, is that right? 9 A Correct. 10 Q You had the client relationship, and he had 11 the delivery responsibility? 12 A Correct. 13 Q And do you recall that in 2006 -- well, 14 question withdrawn. 15 Isn't it true that IBM has assessments 16 performed of client satisfaction for their contracts 17 on an annual basis? 18 A That is correct. 19 Q And that was true in 2006, isn't that correct? 20 A Correct. 21 Q And they're called CERS, C-E-R-S, is that 22 right? 23 A Correct. 24 Q And what does that stand for? 25 A I apologize, I believe -- I know it is client</p>
<p style="text-align: right;">Page 1222</p> <p>1 to the project executive. If it was a material 2 change, then I would be brought into the discussion. 3 In either scenario I'm accountable. 4 Q In either scenario you're ultimately 5 responsible for the additional resources that are 6 assigned to WellPoint, is that correct? 7 A Correct. 8 Q And if a request for additional resources, 9 people, was more than -- how many would you be the one 10 who would need to ultimately approve it? 11 A It was not necessarily a specific standard. 12 It would be situationally dependent both on the 13 contract, and at different points in the year there's 14 different levels. 15 Q And in the WellPoint contract specifically, 16 and let's say specifically 2006, isn't it fair to say 17 that if someone wanted as many as three or four or 18 five additional employees, that you would be 19 responsible for whether or not that approval was 20 granted? 21 A For something of that small size, I doubt that 22 approval would come to me. 23 Q And who, in your testimony, who had authority 24 to approve that kind of additional resources? 25 A Somewhere between the project executive and</p>	<p style="text-align: right;">Page 1224</p> <p>1 relationship surveillance. I don't know what the E 2 stands for. 3 Q And these are surveys that are conducted by 4 the clients themselves, right? 5 A No. 6 Q These are independent -- explain how the 7 surveys are conducted, please. 8 A There's a third-party that will interview the 9 client, and collect the information, and then it is 10 provided to the IBM team. 11 Q And as I understand it, there are two 12 important parts of the CERS surveys, one of which is 13 client satisfaction score, which is 1 to 10, is that 14 right? 15 A Correct. 16 Q And 10 is a perfect score? 17 A That's correct. 18 Q And the other is whether or not the client is 19 willing to agree to be a reference, is that right? 20 A Correct. 21 Q And those are the two high profile most 22 important parts of this service, isn't that right? 23 A Those are certainly two very important 24 elements of the survey. 25 Q And in 2006 on the contracts that Mr.</p>

<p style="text-align: right;">Page 1225</p> <p>1 Castelluccio worked on, do you remember how many 10 2 scores were received from contracts on which he and 3 you both were working? 4 A I do not recall. 5 Q Do you remember if he had a perfect 10 score 6 from BMS? That was one of the contracts, right? 7 A Bristol Myers Squibb was a contract, yes. 8 Q And do you recall whether in 2006 Bristol 9 Myers Squibb gave -- 10 A I do not recall the specific numbers by 11 client. 12 Q And how about Horizon, was that one of the 13 contracts at the time? 14 A Yes, it was. 15 Q And do you recall whether they also gave a 10 16 perfect score? 17 A Again, I don't have the specific numbers for 18 each client. 19 Q And do you recall about Pacific Care, was that 20 one of the contracts at the same time? 21 A Yes, it was. 22 Q And do you recall what score they gave? 23 A I do not. 24 Q And how about Sanofi Novartis AV? 25 A Sanofi Novartis.</p>	<p style="text-align: right;">Page 1227</p> <p>1 Michigan Unemployment Offices. Do you remember that? 2 A Yes. 3 Q And was there a contract with the State of New 4 York? 5 A Yes. 6 Q And there was a contract with the State of 7 Washington? 8 A Yes. 9 Q And you don't recall that all of those 10 contracts gave a perfect score of 10 in terms of 11 client satisfaction? 12 A Again, I don't remember the scores for each 13 client in 2006. 14 Q Do you remember that there were an additional 15 three contracts that gave a score of 9 out of 10 in 16 terms of client satisfaction, Nasco, Novartis and the 17 State of Michigan, do you remember that? 18 A Same response. 19 Q Again, that's just a level of detail that you 20 weren't focused on? 21 A No, that's not what I said at all. Client 22 satisfaction is very important. 23 Q In fact, it's critical, that's the acid test 24 of how the client feels, isn't that correct? 25 A It is a very important element.</p>
<p style="text-align: right;">Page 1226</p> <p>1 Q That was one of the contracts as well, wasn't 2 it? 3 A Correct. 4 Q And do you recall whether they gave a 10, a 5 perfect 10 score? 6 A I, again, from 2006 I do not have each score 7 for each client. 8 Q And how about the Commonwealth of 9 Pennsylvania, was that one of the contracts? 10 A Yes, it was. 11 Q State of Arizona, was that one of the 12 contracts, Department of Transportation, State of 13 Arizona? 14 A Yes. 15 Q And also the State of California, that was one 16 of the contracts? 17 A Correct. 18 Q And also -- there was actually several 19 contracts in the State of California at that time, 20 weren't there, 2006? 21 A Yes. There was two. 22 Q And there was one contract for the State of 23 Maryland? 24 A Correct. 25 Q And there was a contract with State of</p>	<p style="text-align: right;">Page 1228</p> <p>1 Q And do you have any recollection of the number 2 of the 30 contracts that Mr. Castelluccio and you 3 worked on, a number of those clients who said yes, we 4 would be pleased to give IBM a reference? 5 A I don't have a specific number on reference 6 ability. 7 Q And WellPoint was one of the 30 contracts on 8 which Mr. Castelluccio worked, isn't that correct? 9 A That's correct. 10 Q We've seen a number of documents that indicate 11 that IBM considered at least four other DPE candidates 12 for the WellPoint contract before Mr. Boxer finally 13 accepted Gordon Echavarria. Do you recall that? 14 A Yes, I do. 15 Q Do you recall that -- and this process began 16 after Mike Morin resigned and around very late March, 17 early April, 2007, is that right? 18 A Correct. 19 Q And so starting at that point, first Ken Weiss 20 was presented and rejected, is that right? 21 A Yes, that's correct. 22 Q And then Robert Jones was also identified as a 23 possible candidate, interviewed by WellPoint, and also 24 rejected. 25 A I believe that's correct.</p>

<p style="text-align: right;">Page 1229</p> <p>1 Q And then a Richard DeLeo was identified as a 2 potential DPE candidate on WellPoint, and ultimately 3 he also did not serve in that role, isn't that right? 4 A I know he didn't serve in the role. I don't 5 know the reason. 6 Q And Ray Johnson was the fourth person -- I'm 7 sorry -- yes, the fourth person who was also 8 identified as a possible candidate, interviewed with 9 WellPoint, and was rejected by Mr. Boxer and Mr. 10 McDonald, is that right? 11 A I believe so, yes. 12 Q And then the last candidate in that time frame 13 was Scott Anderson, and he also was identified as a 14 potential candidate, introduced to Mr. Boxer, and Mr. 15 McDonald, and rejected again, isn't that correct? 16 A I don't remember Scott Anderson. 17 Q And this process, again, started sometime in 18 late May, early April, and ran through until Gordon 19 Crawford accepted the position, isn't that right? 20 A Correct. 21 Q And Mr. Crawford accepted the position when? 22 Do you recall? 23 A I believe the beginning of 2008. 24 Q That's when he actually started. When did he 25 accept the position?</p>	<p style="text-align: right;">Page 1231</p> <p>1 REDIRECT EXAMINATION BY MR. DUFFIELD: 2 3 Q If you'll turn to Defendant's Exhibit 12. 4 This is the e-mail now we've seen a couple of times 5 that you sent to Mr. Jones forwarding Chris 6 Nicoletti's e-mail to you. You referred a couple 7 times to these e-mails from your direct reports as 8 escalations. Can you explain what an escalation is? 9 What you mean by that? 10 A So an escalation would mean that a 11 responsibility or task that was not being completed by 12 that level of either professional or management, the 13 next layer of management looks at the situation and 14 determines they need to raise it to their management 15 or boss because it's causing a performance issue or 16 concern. 17 Q Thank you. So on this e-mail you sent to Mr. 18 Jones, after you ask him not to forward it, you then 19 say, "The attached is one of a stream of notes that I 20 get from my executives --" plural "-- with 21 concerns --" plural "-- on responsiveness or follow-up 22 from Jim." 23 So is this the only time anyone had ever 24 raised an issue with you about his responsiveness? 25 A No, it's not.</p>
<p style="text-align: right;">Page 1230</p> <p>1 A It would have been in the fourth quarter of 2 2007. 3 Q So in the fourth quarter. So you're basically 4 talking these parade of candidates went through 5 starting in April through sometime in the fourth 6 quarter, is that right? 7 A Correct. 8 Q Can you identify a specific month in this time 9 period from April to November in which IBM ceased 10 looking for a replacement for Mike Morin? 11 A I don't recall that period that they ceased 12 looking for a replacement. 13 Q Throughout that period they continued to try 14 to find a replacement for Mike Morin, isn't that 15 correct? 16 A That would be correct. 17 MR. CARTA: May I have just a moment? 18 I have no further questions, Your Honor 19 THE COURT: Okay. 20 MR. DUFFIELD: If I could have one minute 21 to review my notes. 22 Thank you, Your Honor. 23 24 25</p>	<p style="text-align: right;">Page 1232</p> <p>1 Q And this was just an example to Mr. Jones? 2 A That is correct. 3 Q And you spoke to Mr. Jones about this and 4 other issues, correct? 5 A That is correct. 6 Q And you had spoken to Mr. Castelluccio about 7 this and other issues? 8 A Correct. 9 Q If you'd turn to Defendant's Exhibit 29. This 10 is the e-mail that you sent to Ms. Collins-Smee in the 11 middle of February of 2007, and you've attached a 12 number of e-mails, and Mr. Carta walked you through a 13 couple of them from Mr. Nicoletti, Mr. Fernandez. 14 Now, are you saying, or were you saying at the time 15 that all of these underlying e-mails were still 16 outstanding issues that hadn't been resolved yet? 17 A No, I was not. I was providing context and 18 the specific situations that had occurred over the 19 past year. 20 Q And again, you had a discussion with Ms. 21 Collins-Smee about these issues and the other issues 22 you had observed with Mr. Castelluccio, correct? 23 A That's correct. 24 Q When Mr. Nicoletti or Mr. Fernandez raised 25 these issues with you, did they ever mention Mr.</p>



<p style="text-align: right;">Page 1233</p> <p>1 Castelluccio's age?</p> <p>2 A No, they did not.</p> <p>3 Q Do you believe that they were raising these</p> <p>4 issues because they had some bias against him because</p> <p>5 of his age?</p> <p>6 A No, I did not.</p> <p>7 Q When you raised those issues with Mr. Jones,</p> <p>8 did you do so because of Mr. Castelluccio's age?</p> <p>9 A No, I did not.</p> <p>10 Q When you raised it with Ms. Collins-Smee, was</p> <p>11 that because of Mr. Castelluccio's age?</p> <p>12 A No, it was not.</p> <p>13 Q Were you aware of Mr. Castelluccio's age?</p> <p>14 A No, I was not.</p> <p>15 Q Would it have mattered?</p> <p>16 A No, it would not have.</p> <p>17 MR. DUFFIELD: No further questions, Your</p> <p>18 Honor.</p> <p>19 THE COURT: Thank you. Nothing further</p> <p>20 with this witness?</p> <p>21 MR. CARTA: I have nothing else, Your</p> <p>22 Honor. Thank you.</p> <p>23 THE COURT: You may step down. Thanks</p> <p>24 very much.</p> <p>25 Well, about one minute to 1, maybe we</p>	<p style="text-align: right;">Page 1235</p> <p>1 McDonald on and off the stand. She has a bunch of</p> <p>2 meetings this week. I'm not quite sure how you're</p> <p>3 going to get out of here, but she does have to testify</p> <p>4 this afternoon, if that's okay with Your Honor.</p> <p>5 THE COURT: That's Keenie?</p> <p>6 MR. DUFFIELD: Yes.</p> <p>7 THE COURT: I feel like I'm a family</p> <p>8 here.</p> <p>9 MR. FASMAN: We've been here for a long</p> <p>10 time, Your Honor.</p> <p>11 THE COURT: I know. Okay, well, let's</p> <p>12 call Ms. McDonald.</p> <p>13 MR. FASMAN: Okay.</p> <p>14 THE COURT: Any objection?</p> <p>15 MR. CARTA: No, Your Honor. I think that</p> <p>16 makes sense, and I would defer to counsel. I</p> <p>17 understand what a challenge it can be to schedule</p> <p>18 witnesses, so by all means.</p> <p>19 THE COURT: But at one point we got to</p> <p>20 realize that we got to let the jury go early, because</p> <p>21 it's going to start building up, they've got to clean</p> <p>22 their cars, and we don't want any juror getting into</p> <p>23 an accident.</p> <p>24 MR. FASMAN: I agree with that.</p> <p>25 THE COURT: And tomorrow -- it's supposed</p>
<p style="text-align: right;">Page 1234</p> <p>1 should take our lunch break now. Be back at 2.</p> <p>2 MR. DUFFIELD: Very good.</p> <p>3 MR. FASMAN: Thank you, Your Honor.</p> <p>4 (Jurors excused)</p> <p>5 (Recess taken from 12:50 p.m. to 2:11 p.m.)</p> <p>6 THE COURT: It's terrible out there. I</p> <p>7 understand one of the jurors expressed concern to the</p> <p>8 clerk about what time, if any, we're going to be</p> <p>9 wrapping things up for today. I've been told that</p> <p>10 Judge Chatigny had a trial going on today but at</p> <p>11 noontime he let the jury go, and I can't think of a</p> <p>12 better Judge to follow than Judge Chatigny. But I</p> <p>13 don't want to seriously eat into your plans or your</p> <p>14 timetable. Anybody want to share any thoughts on this</p> <p>15 regard with me?</p> <p>16 MR. FASMAN: Your Honor, we have two</p> <p>17 witnesses here this afternoon. One of them is Ms.</p> <p>18 McDonald, and we would very much like to get her on</p> <p>19 and off the stand. I believe her testimony will be</p> <p>20 relatively brief, and we can conclude. I don't</p> <p>21 think -- Mr. Duffield's going to inquire. I can't</p> <p>22 believe that her direct is going to go more than 35 or</p> <p>23 40 minutes, and I don't think there could be extensive</p> <p>24 cross. Mr. Holmes is here as well. He might be a</p> <p>25 little longer. But we really do want to get Ms.</p>	<p style="text-align: right;">Page 1236</p> <p>1 to be between five and nine inches of snow. If that's</p> <p>2 true, then we'll be coming in later tomorrow, and</p> <p>3 probably later like 11:30 or so, because that will</p> <p>4 mean that I won't actually have to get up, and I will</p> <p>5 actually have to do the snowblowing.</p> <p>6 MR. FASMAN: Don't you have clerks? They</p> <p>7 don't have to blow up the snow, but they could pick</p> <p>8 you up, right?</p> <p>9 THE COURT: Probably could, but I don't</p> <p>10 think I would go that far.</p> <p>11 MR. FASMAN: I had a good relationship</p> <p>12 with them up until now.</p> <p>13 THE COURT: They already mow my lawn.</p> <p>14 No, I mean for people who deal with</p> <p>15 abstractions all the time, it's really gratifying to</p> <p>16 lift up the garage door and have them lift it up and</p> <p>17 see this lawn of snow. I have this really big</p> <p>18 snowblower, and I look at my wife and I say, I really</p> <p>19 am a man, I'm not a wimp, don't push the electric</p> <p>20 starter on that snowblower, I go in and throw this</p> <p>21 thing of snow like 60 feet. About an hour later I</p> <p>22 have moved 72 tons of snow, and I walk in my wife</p> <p>23 looks at me, my hero, I can now go Macy's where</p> <p>24 they're having a sale, you know?</p> <p>25 Okay. Well, we'll have to talk about</p>

<p style="text-align: right;">Page 1237</p> <p>1 that. I'm thinking like if I can just get my car out,  2 and get my wife's car out, that ought to be go enough  3 for 45 minutes, maybe 11 o'clock, something like that.  4 (Jurors present)  5 THE COURT: Welcome back, ladies and  6 gentlemen. Sit down. Let's move on.  7 MR. DUFFIELD: Call Keenie McDonald to  8 the stand, please.  9 THE COURT: Ms. McDonald, would you come  10 forward, please, ma'am.  11 (Keenie McDonald, sworn by the clerk)  12 THE CLERK: Please state your name, spell  13 your last name for the record.  14 THE WITNESS: Keenie McDonald,  15 M-C-D-O-N-A-L-D.  16 THE CLERK: Your business address?  17 THE WITNESS: 7 Georgetown North in  18 Greenwich, Connecticut.  19  20 DIRECT EXAMINATION BY MR. DUFFIELD:  21  22 Q Good afternoon, Ms. McDonald.  23 When did you first begin working for IBM?  24 A June 1978.  25 Q And do you still work there?</p>	<p style="text-align: right;">Page 1239</p> <p>1 managing director on the WellPoint account?  2 A As managing director, which I still am today,  3 I have responsibility for all the activities at IBM  4 and WellPoint.  5 Q Who were your primary contacts at WellPoint  6 that you would have interacted with on a regular  7 basis?  8 A At the point in time we're talking about it  9 was Mark Boxer and Dave McDonald.  10 Q And who is Mark Boxer?  11 A He was the chief operating officer.  12 Q And Dave McDonald?  13 A He was the vice president of infrastructure,  14 IT infrastructure.  15 Q And when you took over as the managing  16 director of WellPoint, was Jim Castelluccio working on  17 that account?  18 A He was involved with that account. He was  19 the -- responsible for all the public sector accounts  20 for outsourcing, and WellPoint was one of those.  21 Q And had you worked with Mr. Castelluccio  22 before this time?  23 A No.  24 Q Would you describe for the jury what your  25 experience was working with Mr. Castelluccio when he</p>
<p style="text-align: right;">Page 1238</p> <p>1 A Yes.  2 Q And what is your current role?  3 A I'm IBM's managing director responsible for  4 WellPoint.  5 Q And can you briefly, briefly describe your  6 employment history at IBM.  7 A I started as a trainee in June of 1978, moved  8 around an awful lot, did a lot of different jobs, and  9 ended up in the northeast in 1998, and did some jobs  10 at corporate headquarters, then I went to Boulder,  11 Colorado for a couple of years, and I came back to  12 live in Connecticut, and in 2006 was responsible for  13 WellPoint.  14 Q Can you explain to the jury why you moved into  15 that managing director at WellPoint role, or the  16 circumstances?  17 A IBM and WellPoint had entered into a large  18 outsourcing relationship, and it was having a lot of  19 challenges, and they wanted to have a senior level IBM  20 executive assigned to the account to help work through  21 the relationship issues and other challenges that we  22 were having, and I wanted to get back to the  23 northeast, because although Boulder is a great place  24 to live, I actually like it better up here.  25 Q What were your responsibilities as the</p>	<p style="text-align: right;">Page 1240</p> <p>1 was in that vice president role?  2 A I don't recall interacting a lot with Jim when  3 he was in that role.  4 Q Let's turn to a document. We'll try and  5 streamline this a little bit. If you'll turn to  6 Defendant's Exhibit 15 in that binder right in front  7 of you.  8 A Okay.  9 Q So the bottom of these two e-mails, we're  10 going to start at the bottom of the first page, is a  11 November -- or September 20th, 2006 e-mail from Luis  12 Fernandez to Mr. Castelluccio. You're copied on it.  13 A Okay.  14 Q And the first line, I'll read it for you,  15 says, "We need your personal involvement to address  16 the cost and service delivery issues at WellPoint."  17 Were those issues that fell within Mr.  18 Castelluccio's responsibility as the VP on the  19 account?  20 A Yes, they did.  21 Q And going to the top of the e-mail, would you  22 please read your e-mail to Dave Liederbach.  23 A My e-mail to Dave: "Dave, I'm sending this to  24 you only. I feel like you and I are getting no help  25 from Jim to improve delivery and to take cost out.</p>

<p style="text-align: right;">Page 1241</p> <p>1 Luis and John do not feel our team gets any help value 2 from Jim and need it." 3 Q And why did you feel like you were getting no 4 help from Jim to improve delivery? 5 A Part of Jim's responsibility as the head of 6 public sector outsourcing delivery team would be to 7 provide assistance when the team asks for it. And 8 John Shimkus and Luis, you can see from this e-mail, 9 were requesting some help from Jim. I think we had a 10 history with Jim, the team did, of asking for help and 11 getting no response, not getting the help needed and 12 the attention from Jim that they needed, so I sent the 13 note to Dave requesting his involvement and attention. 14 Q And had you had any discussions with Mr. 15 Liederbach about these issues prior to this e-mail? 16 A I'm sure I had. 17 Q And subsequent to the e-mail as well? 18 A Yes, most definitely. 19 Q Did you ever have discussions with Mr. 20 Castelluccio about these issues? 21 A I had discussions with Jim for sure when he 22 became the DPE, acting DPE at WellPoint. I don't 23 recall specific conversations with Jim when he was in 24 the vice president role. 25 Q And we'll get to his role as the DPE in just a</p>	<p style="text-align: right;">Page 1243</p> <p>1 Q And did you agree with his opinion of Mr. 2 Castelluccio's performance? 3 A Yes. 4 Q If you'll turn to the next exhibit, which is 5 Defendant's Exhibit 17, this is an e-mail sent the 6 next day. So the prior e-mail was on September 28th, 7 this is now September 29th, and you send it to Mr. 8 Castelluccio. Would you please read your e-mail for 9 us. 10 A "Jim, I know you've talked to Luis and John. 11 We absolutely must get on with moving e-mail to a 12 competency. I've been with IBM for 28 years and on a 13 customer call today was more embarrassed than I have 14 ever been. A customer literally said that he has no 15 confidence in what we tell him regarding e-mail 16 because we've missed every commitment we have made. 17 Please get on the actions per your call with John and 18 Luis." 19 Q Now, is it your -- did you believe that all of 20 these problems with competency in the e-mail with 21 WellPoint were Jim Castelluccio's fault? 22 A No. 23 Q This e-mail's only directed to him. Why are 24 you raising this issue with just him? 25 A Jim's job as the vice president was</p>
<p style="text-align: right;">Page 1242</p> <p>1 second. 2 A Okay. 3 Q If you'll turn to the next exhibit in that 4 binder. It should be Defendant's Exhibit 16. 5 A Okay. 6 Q And I'll direct your attention to the middle 7 of the page. Again, Luis Fernandez e-mailing you on 8 September 27th, 2006. 9 A Okay. 10 Q And if you could read the highlighted portion 11 of his e-mail for the jury. 12 A "My concern with Jim is he is not stepping up 13 to either the financial nor service quality 14 challenges, in my opinion anyway, thanks." 15 Q And had you had discussions with Mr. Fernandez 16 about Jim not stepping it up to the financial or 17 service call? 18 A Yes. 19 Q And what were the nature of those 20 conversations? 21 A Luis would express on frequent occasions his 22 frustration with going to Jim, asking for help, 23 getting commitments that weren't followed through on 24 or followed up on, no response, just not getting the 25 kind of help and support that the team felt we needed.</p>	<p style="text-align: right;">Page 1244</p> <p>1 responsible for the delivery for public sector 2 accounts. Again, WellPoint was part of the public 3 sector accounts. Jim was -- his job was to help us 4 get these issues resolved and get the delivery 5 assistance and support we needed. 6 Q And did you feel like you were getting that 7 support from him? 8 A No, we did not feel we were getting that 9 support. 10 Q If you'd turn to Defendant's Exhibit 32. 11 A Okay. 12 Q The bottom e-mail is from you to Ms. 13 Collins-Smee. It's dated February 16, 2007. Subject 14 line is "My barrage of e-mails." Do you remember 15 sending a lot of e-mails to Ms. Collins-Smee around 16 the February 2007 time frame that she took over as the 17 general manager? 18 A I sent Joanne a ton of e-mails. 19 Q Would you please read this e-mail to the jury. 20 A "Joanne, forgive me for copying you on so many 21 e-mails. I'm doing it because Jim Castelluccio and 22 our delivery team have a track record of not executing 23 even when they commit to do. I'm looking forward to 24 not feeling like I have to follow up with them on 25 almost every single detail on not copying you. Thanks</p>

<p style="text-align: right;">Page 1245</p> <p>1 again for your help."</p> <p>2 Q And again, the issues were not limited to Mr.</p> <p>3 Castelluccio, they involved the entire WellPoint</p> <p>4 account and other delivery issues, correct?</p> <p>5 A That's correct.</p> <p>6 Q But you single out Mr. Castelluccio in your</p> <p>7 e-mail to Joanne because he was the delivery leader on</p> <p>8 the account?</p> <p>9 A He was -- his job was to help us get our</p> <p>10 delivery issues resolved and addressed, and we weren't</p> <p>11 getting satisfaction. We weren't getting the help</p> <p>12 that we needed. Again, he was not the problem, but he</p> <p>13 was there to provide help and assistance so that we</p> <p>14 got the problems resolved. We were not getting the</p> <p>15 help and assistance we needed.</p> <p>16 Q In addition to the barrage of the e-mails that</p> <p>17 you sent Ms. Collins-Smee, do you remember speaking to</p> <p>18 her personally about these issues as well?</p> <p>19 A I talked to Joanne a number of times.</p> <p>20 Q Did you ask her to make a change with the</p> <p>21 leadership on the WellPoint account?</p> <p>22 A Yes. As time went on, yes.</p> <p>23 Q And we've heard testimony that eventually Ms.</p> <p>24 Collins-Smee did remove him from the vice president</p> <p>25 position, and that at the end of March Mike Morin</p>	<p style="text-align: right;">Page 1247</p> <p>1 Q And how did he perform?</p> <p>2 A Very poorly. I'm sad to say.</p> <p>3 Q Why do you say that?</p> <p>4 A Why do I say he performed poorly?</p> <p>5 Q Yes. Sorry.</p> <p>6 A His pattern of not responding to requests in a</p> <p>7 timely manner continued. We would ask Jim for</p> <p>8 something, you'd have to follow up repeatedly to make</p> <p>9 sure you got an answer. We would have a series of</p> <p>10 issues in the IT environment at WellPoint that we were</p> <p>11 responsible for, and we had SWAT calls -- they're</p> <p>12 called SWAT calls -- with the client to resolve the</p> <p>13 problems, and Jim often times would not show up on the</p> <p>14 SWAT calls, and we needed him on those calls. It was</p> <p>15 very obvious to the client that our delivery leader</p> <p>16 wasn't on the SWAT call, or wasn't on a lot of SWAT</p> <p>17 calls.</p> <p>18 Q Can you explain to the jury what a SWAT call</p> <p>19 is?</p> <p>20 A A SWAT call is when we're having a problem,</p> <p>21 the IT environment is down, it's not working properly,</p> <p>22 we would all get on a big conference call with a</p> <p>23 number of people to talk. We're having these issues,</p> <p>24 let's try to troubleshoot, understand what the issues</p> <p>25 are, and then fix the issues so we get the client back</p>
<p style="text-align: right;">Page 1246</p> <p>1 resigned as the DPE on the WellPoint account and Mr.</p> <p>2 Castelluccio was brought in. Do you remember that</p> <p>3 happening?</p> <p>4 A Yes.</p> <p>5 Q And were you involved in that decision to</p> <p>6 assign Mr. Castelluccio as the DPE at WellPoint?</p> <p>7 A Yes. They had my approval to do so.</p> <p>8 Q And what was the rationale with putting him on</p> <p>9 the account in that role?</p> <p>10 A Jim had a lot of experience. He should have</p> <p>11 been able to perform that role very effectively. And</p> <p>12 the hope was, my hope was, you know, with one account</p> <p>13 Jim would be able to perform the DPE responsibilities</p> <p>14 and we'd get WellPoint in good shape. That was my</p> <p>15 hope.</p> <p>16 Q And did you have any communications with</p> <p>17 WellPoint about moving Mr. Castelluccio to this role?</p> <p>18 A Yes. I let hem know we'd with be doing that.</p> <p>19 When Mike resigned I let WellPoint know.</p> <p>20 Q And what was their response?</p> <p>21 A I don't recall their response specifically,</p> <p>22 but they were fine with it. I mean they didn't --</p> <p>23 they were sorry to see Mr. Morin leave, but they had</p> <p>24 no problem with Jim coming in and giving it his best</p> <p>25 shot.</p>	<p style="text-align: right;">Page 1248</p> <p>1 up and running.</p> <p>2 Q And why was it important to have Mr.</p> <p>3 Castelluccio on those calls?</p> <p>4 A Particularly when he was assigned, you know,</p> <p>5 as the DPE for WellPoint, we needed him on those calls</p> <p>6 because he was the delivery leader, and his job -- I</p> <p>7 mean they were certainly used to Mike Morin being on</p> <p>8 the calls, I was on the calls, a number of WellPoint</p> <p>9 executive team leaders would also be on the calls, and</p> <p>10 we needed Jim's leadership on those calls and</p> <p>11 involvement so the client would know we're all in.</p> <p>12 Q Did you ever address these issues with Mr.</p> <p>13 Castelluccio?</p> <p>14 A I had some conversations with Jim, yes. Yes,</p> <p>15 he knew.</p> <p>16 Q What did you say to him?</p> <p>17 A I let him know that the client was concerned</p> <p>18 that he was not on the SWAT calls and that we needed</p> <p>19 him on the calls. I let him know that the client was</p> <p>20 concerned about the lack of delivery leadership, and</p> <p>21 that Jim's not visible to the client, and we needed</p> <p>22 him.</p> <p>23 Q And what was Mr. Castelluccio's response to</p> <p>24 you?</p> <p>25 A It's been a long time ago, obviously. I</p>

<p style="text-align: right;">Page 1249</p> <p>1 recall on one occasion when I spoke with Jim about his  2 being on SWAT calls, Jim said he was -- he would try  3 to be on the calls, he was dealing with some resource  4 action, and I thought he would start showing up and  5 being on the calls.  6 Q Did you see any improvement with him being on  7 more calls after you raised this with him?  8 A I did not see improvement. I did not see  9 improvement.  10 Q If you would turn to Defendant's Exhibit 48.  11 A Okay.  12 Q Just take a second and look through this  13 e-mail and I'll ask you a few questions.  14 A Okay.  15 Q Okay. I'll focus on the top e-mail from Mark  16 Boxer to you dated May 7th, 2007. If you could read  17 the highlighted portions of that e-mail to the jury,  18 please.  19 A "I'm disappointed that given how many issues  20 we have had no one gave us a heads up on total or  21 areas. Who would have had responsibility - Jim is  22 invisible from what I can tell."  23 Q And what are the issues that she's talking  24 about in this e-mail?  25 A We had some resource actions where we took</p>	<p style="text-align: right;">Page 1251</p> <p>1 about being on if SWAT calls, and he said he's  2 involved in some resource actions. I don't recall Jim  3 telling me he had too much to do to be on -- to do his  4 job properly for WellPoint. I don't recall that.  5 Q Did he ever ask you for help?  6 A No. I would have remembered, because I was  7 looking for help everywhere at this point in time.  8 Q If you will turn to Defendant's Exhibit 49.  9 A Okay.  10 Q So this is an e-mail string under the same  11 time, beginning of May. I'll direct your attention to  12 the bottom of the page, your e-mail to Ms.  13 Collins-Smee to Mr. Castelluccio, John Shimkus, you  14 copied Luis Fernandez and Dave Liederbach, and the  15 subject line is "Help Needed ASAP." In the middle of  16 that paragraph there's a dash that says "Jim said."  17 Would you please read that sentence?  18 A "Jim said he would get the names from delivery  19 of the 16 or so people who are backfilling people that  20 the competencies let go as bottom performers but we  21 all agreed we need to replace them."  22 Q So what's the issue there? What are you  23 asking for for Mr. Castelluccio?  24 A I'm asking for a series of names of people  25 that were going to backfill.</p>
<p style="text-align: right;">Page 1250</p> <p>1 some people that had been assigned to the account off  2 of the account.  3 Q And would that have been Mr. Castelluccio's  4 responsibility to communicate that to Mr. Boxer or to  5 WellPoint?  6 A Jim's responsibility, my responsibility, you  7 know, several of us could have taken the lead to have  8 the conversation with him, but you would expect that  9 the delivery leader is talking to the client about  10 changes in the delivery team, why we're making the  11 changes, and the fact that what's associated with  12 those changes. So you would expect that Jim -- I  13 would expect that Jim or any delivery leader would  14 have a direct line going with the client about changes  15 in the team.  16 Q Now, this e-mail is dated May 7, 2007. We  17 heard testimony from Mr. Castelluccio that during this  18 time he believed that he was still wearing two hats.  19 He was still serving in the VP role as well as  20 managing the WellPoint account. Did he ever raise  21 that concern with you, that he had too much on his  22 plate and couldn't be on all of these SWAT calls or  23 couldn't maintain communication with the client?  24 A The only time I can remember -- I remember one  25 conversation with Jim, again, when I talked to him</p>	<p style="text-align: right;">Page 1252</p> <p>1 Q And the e-mail right above that one, Ms.  2 Collins-Smee forwards the e-mail to Mr. Castelluccio  3 the same day, and says, "Jim, please respond to Keenie  4 and copy me. Where are we on the items that Keenie  5 indicates you have been addressing? Thanks."  6 If you now turn the page to Defendant's  7 Exhibit 50. This e-mail is two days later. It's a  8 continuation of the string. You send it to Jim  9 Castelluccio and Ms. Collins-Smee. And would you  10 please read the first sentence of your e-mail.  11 A "Jim and Joanne, I have not heard anything  12 from Jim on the names that are backfills. We have to  13 have this done immediately."  14 Q So two days later you still hadn't heard from  15 Jim despite you reaching out to him and Ms.  16 Collins-Smee reaching out to him, correct?  17 A Correct.  18 Q Was this typical?  19 A Yes. There was a lot of follow-up with regard  20 to Jim, unfortunately.  21 Q If you turn to Defendant's Exhibit 52.  22 A Okay.  23 Q Directing your attention to the bottom of that  24 first page, you send an e-mail to Bob Zapfel and Ms.  25 Collins-Smee, and at the last half of your e-mail you</p>



<p style="text-align: right;">Page 1253</p> <p>1 say, "We have had some visual delivery issue where 2 Mike Morin would have been front and center. The 3 absence of delivery leadership is very noticeable." 4 What were you referring to there? 5 A When we had a SWAT call -- again, when Mike 6 Morin was our delivery project executive. Mike would 7 be on the SWAT calls, I would be on the SWAT calls. I 8 mean, I was on SWAT calls, the client was on SWAT 9 calls, and Jim all too often was not on them. 10 Q And why are you directing your e-mail to Bob 11 Zapfel? What was his role? 12 A Bob at the time -- I think both Joanne and 13 Dave Liederbach reported in to Bob, so I'm just going 14 up the chain of command because I'm not getting the 15 response that I'm looking for in terms of support from 16 my client. 17 Q So you've addressed the issue with Mr. 18 Castelluccio, and you see no improvement. You then 19 have escalated the issue to his manager, Joanne 20 Collins-Smee, still not getting the responsiveness you 21 need from Ms. Castelluccio. Now you've gone one more 22 level of management to Mr. Zapfel. 23 A That's correct. 24 Q If you'll turn to Defendant's Exhibit 54. 25 A Okay.</p>	<p style="text-align: right;">Page 1255</p> <p>1 on the calls, and we needed him there. 2 Q Now, we've heard testimony that in June of 3 2007 Miguel Echavarria took over as the vice president 4 of the public sector for delivery, and at that point 5 Jim was undisputedly focused exclusively on the DPE 6 for WellPoint role. Did you see any marked 7 improvement with his performance and his 8 responsiveness after June? 9 A I didn't. 10 Q And did you discuss it with Mr. Castelluccio 11 after June of 2007? 12 A I have to believe I did, because that's an 13 important role. It was the most important role 14 probably for us at WellPoint, so I have to believe I 15 did. 16 Q If you'll turn to Defendant's Exhibit 57. 17 This is an e-mail dated June 1st, 2007, from you to 18 Mr. Zapfel, Ms. Collins-Smee and Dave Liederbach. 19 We've seen this document already with some other 20 references. You're referencing some phone calls you 21 had with Mr. Boxer and Mr. McDonald. 22 About a third of the way down the e-mail you 23 say, "Dave McDonald literally said, I don't even waste 24 my time trying to contact Jim anymore." 25 What was your reaction when Mr. McDonald told</p>
<p style="text-align: right;">Page 1254</p> <p>1 Q This is a short e-mail, one-liner, from Mr. 2 Boxer to you, the end of May 2007, and if you could 3 read the e-mail and explain it to the jury, please. 4 A "Keenie, how about Jim - is he committed to 5 acting like an interim head - he is MIA." 6 Again, this was a note to me wondering where 7 Jim was, not seeing the leadership out of Jim that he 8 would expect a delivery project exec to show. 9 Q And if you'd turn to Defendant's Exhibit 56. 10 A Okay. 11 Q The bottom e-mail is from Mark Boxer, the same 12 day as the prior e-mail we just looked at, May 23rd, 13 2007, and he says, "Keenie, got your voicemail. I'm 14 in meetings in Indiana. If he is 70 percent why is he 15 never on a call?" 16 You then respond -- or you forward that e-mail 17 to Jim Castelluccio, and say, "Jim, we need to talk 18 about your involvement on the SWAT calls. Please see 19 below." 20 Did you have a conversation with Mr. 21 Castelluccio at this time about his involvement in 22 SWAT calls? 23 A I'm sure I did. I mean I'm sure I did. I 24 definitely talked to Jim about the fact that the 25 client -- it was just so noticeable that Jim was not</p>	<p style="text-align: right;">Page 1256</p> <p>1 you that? 2 A You know, when your client tells you that 3 there's one of your colleagues at IBM who's supposed 4 to be adding value, who's supposed to be doing a job 5 and the client tells you they don't even waste their 6 time trying to contact them, it's extraordinarily 7 disappointing, it's embarrassing, it's detrimental to 8 the relationship. We're not doing our job for the 9 client. 10 Q If you'll turn to Defendant's Exhibit 64. 11 So this is an e-mail from you to Mark Boxer. 12 It's in August 2007. So again, so we keep it in 13 context, Mr. Castelluccio now has been serving as the 14 DPE of WellPoint for at least five months, but for 15 three months exclusively on the WellPoint account. 16 Had you seen any changes in his responsiveness or his 17 participation involvement with delivery leadership at 18 that point? 19 A No. I -- no. 20 Q Let me direct your attention to the last 21 sentence of the first paragraph. Can you read that to 22 the jury, please? 23 A "Jim C knows he's not going to be our 24 permanent DPE and will need to move on." 25 Q How do you know that Jim knew he wasn't going</p>



Page 1257	Page 1259
<p>1 to be the permanent DPE in August?</p> <p>2 A Too many complaints. I mean I had lodged too</p> <p>3 many complaints with his management chain, the</p> <p>4 customer had lodged too many complaints with IBM in</p> <p>5 general. Jim had to know, it wasn't working.</p> <p>6 Q Had you spoken to Jim about these issues?</p> <p>7 A I'd spoken to Jim about issues, our delivery</p> <p>8 performance, in terms of the client's not happy, we're</p> <p>9 not showing the leadership that we need to be. I</p> <p>10 don't recall, it's been a long time, but most</p> <p>11 definitely Jim and I talked about the fact that this</p> <p>12 isn't working, this isn't working.</p> <p>13 Q All right. If you will turn now to</p> <p>14 Defendant's Exhibit 66. This is a quite a lengthy</p> <p>15 e-mail string in September of 2007, and I'm going to</p> <p>16 direct your attention to the second page. The top</p> <p>17 e-mail there is from you again to Bob Zapfel dated</p> <p>18 September 2nd, 2007, and if you can on the screen read</p> <p>19 for the jury the highlighted portions.</p> <p>20 A "The permanent delivery project exec for</p> <p>21 WellPoint has been open since April 1st. The acting</p> <p>22 DPE is not providing the delivery leadership needed</p> <p>23 internally over WellPoint. We need a strong delivery</p> <p>24 leader on WellPoint immediately to help us identify</p> <p>25 and draw up actions needed to achieve stability and to</p>	<p>1 Q And how did he do when he took over?</p> <p>2 A He was fantastic. He was amazing.</p> <p>3 Q Can you give us examples of why he was so</p> <p>4 great?</p> <p>5 A He took his responsibility very seriously. He</p> <p>6 engaged directly with the client. He joined the SWAT</p> <p>7 calls. He was very proactive. You could ask for in</p> <p>8 one time to do something and he would follow through,</p> <p>9 you never had to follow up. He brought creative,</p> <p>10 thoughtful, proactive ideas to us that we needed. He</p> <p>11 was outstanding.</p> <p>12 Q Now, did Mr. Crawford do anything that Mr.</p> <p>13 Castelluccio couldn't have done when he was in that</p> <p>14 role?</p> <p>15 A I don't think so. I think Jim had the</p> <p>16 experience and the skills. If he had wanted to do it</p> <p>17 I think he could have done it, and I frankly, to be</p> <p>18 really honest with you, I hoped that he would. In an</p> <p>19 ideal world what would have happened is Jim would have</p> <p>20 assumed the role as acting DPE and would have fixed</p> <p>21 everything or help us -- help us fix everything, and</p> <p>22 we would have had lot fewer problems, a lot happier</p> <p>23 client, and he could have been the permanent DPE as</p> <p>24 far as I'm concerned.</p> <p>25 Q Thank you very much.</p>
Page 1258	Page 1260
<p>1 avoid important business losses."</p> <p>2 Q What was Mr. Castelluccio's role or</p> <p>3 responsibility with regard to stability issues?</p> <p>4 A As the delivery leader they were substantial.</p> <p>5 I mean our delivery team working with WellPoint had</p> <p>6 responsibility to provide a stable IT environment to</p> <p>7 the client. That was our job.</p> <p>8 Q And your concern was that Mr. Castelluccio</p> <p>9 wasn't meeting those issues, or dealing with those</p> <p>10 issues?</p> <p>11 A That was my concern. That was my concern.</p> <p>12 Q Had you discussed that with the client?</p> <p>13 A Yes. The client -- in some of the prior</p> <p>14 e-mails, I mean the client would say on SWAT calls he</p> <p>15 was not there. Dave McDonald stopped calling. Yes, I</p> <p>16 had lots of conversations. The client was very</p> <p>17 unhappy.</p> <p>18 Q We know that eventually Mr. Castelluccio was</p> <p>19 moved out of the DPE role and Gordon Crawford was</p> <p>20 brought in. Were you involved in the decision to</p> <p>21 select and assign Mr. Crawford to the DPE role?</p> <p>22 A Yes.</p> <p>23 Q And why was Mr. Crawford selected?</p> <p>24 A He had a very good background, very good set</p> <p>25 of experience, very skilled.</p>	<p>1 MR. DUFFIELD: I have no further</p> <p>2 questions.</p> <p>3 THE COURT: Mr. Carta.</p> <p>4</p> <p>5 CROSS-EXAMINATION BY MR. CARTA:</p> <p>6</p> <p>7 Q Good afternoon, Ms. McDonald. I'm Mark Carta,</p> <p>8 and I represent Mr. Castelluccio.</p> <p>9 A Good afternoon.</p> <p>10 Q Let me just ask you, you just put up</p> <p>11 Defendant's Exhibit 48. And you have identified</p> <p>12 yourself as the person who was overall responsible for</p> <p>13 the WellPoint account.</p> <p>14 A Yes.</p> <p>15 Q It was your client relationship.</p> <p>16 A Yes.</p> <p>17 Q And that was your only client, just WellPoint.</p> <p>18 A That's right.</p> <p>19 Q And you were supposed to manage everything</p> <p>20 that related to WellPoint, isn't that right?</p> <p>21 A Yes.</p> <p>22 Q And how regularly did you speak to Mr. Boxer?</p> <p>23 A Very.</p> <p>24 Q Give me some idea. At least weekly, almost</p> <p>25 daily?</p>

<p style="text-align: right;">Page 1261</p> <p>1 A At least weekly. Multiple times a week, I</p> <p>2 would assume. Not daily probably, but Mark and I</p> <p>3 spoke a lot.</p> <p>4 Q And one of his concerns was that he thought</p> <p>5 IBM needed to provide more staffing, isn't that</p> <p>6 correct?</p> <p>7 A I don't recall him saying he needed more</p> <p>8 staff.</p> <p>9 Q Isn't it true that he felt that IBM needed to</p> <p>10 put the resources that were required on the WellPoint</p> <p>11 account in order to resolve the problems that were</p> <p>12 emerging?</p> <p>13 A Yes.</p> <p>14 Q And one of those resources was qualified,</p> <p>15 competent staff?</p> <p>16 A Yes.</p> <p>17 Q And isn't it true that at one point, and</p> <p>18 that's what's reflected on this Exhibit 48, IBM was</p> <p>19 actually pulling staff off of the WellPoint account?</p> <p>20 A We did staff changes on the account.</p> <p>21 Q But that's what Mr. Boxer is talking about</p> <p>22 here, isn't it, that he's surprised that no one told</p> <p>23 him that you're pulling staff off of the WellPoint</p> <p>24 account?</p> <p>25 A He was disappointed and he was surprised that</p>	<p style="text-align: right;">Page 1263</p> <p>1 Q And he was disappointed, isn't that fair?</p> <p>2 A It seems so.</p> <p>3 Q Let me see Exhibit 130, Plaintiff's 130.</p> <p>4 A Is that in the binder?</p> <p>5 MR. DUFFIELD: No, it'll be the maroon</p> <p>6 binders.</p> <p>7 THE WITNESS: Okay, let me grab that.</p> <p>8 MR. CARTA: Do you have it?</p> <p>9 THE WITNESS: Yes, it's on the table.</p> <p>10 130?</p> <p>11 MR. CARTA: Yes, please.</p> <p>12 THE WITNESS: Okay.</p> <p>13 You've killed a lot of trees here. I got</p> <p>14 to go to binder 2.</p> <p>15 Okay.</p> <p>16 BY MR. CARTA:</p> <p>17 Q So these are two e-mails. One's from Ms.</p> <p>18 Collins-Smee at the top to Mr. Zapfel, and then</p> <p>19 there's one in the middle of the page from you to Mr.</p> <p>20 Shimkus, right?</p> <p>21 MR. DUFFIELD: Your Honor, if she needs</p> <p>22 time to read the document, she should familiarize</p> <p>23 herself with it.</p> <p>24 MR. CARTA: I'm sorry.</p> <p>25 THE WITNESS: That's okay.</p>
<p style="text-align: right;">Page 1262</p> <p>1 he didn't have more notice that we were making staff</p> <p>2 changes to the account.</p> <p>3 Q Right. And you were the one who was in charge</p> <p>4 of the account, and you met with him you said almost</p> <p>5 daily, and you didn't tell him that they were pulling</p> <p>6 people off the account, isn't that correct?</p> <p>7 A I don't recall if I talked with Mark about the</p> <p>8 LEAN actions or not. Clearly I had an exchange with</p> <p>9 him, but he -- I don't recall whether I talked with</p> <p>10 him ahead of time or not.</p> <p>11 Q But in this e-mail he's saying to you he's</p> <p>12 disappointed that you hadn't talked to him ahead of</p> <p>13 time isn't that true?</p> <p>14 A He's saying he's disappointed that given how</p> <p>15 many issues we've had, no one gave them a heads up,</p> <p>16 gave us a heads up on total areas, and Shimkus called</p> <p>17 Dave, that would have been Dave McDonald, with a</p> <p>18 generic message that said LEAN is coming.</p> <p>19 Q And isn't it true that you just said a few</p> <p>20 moments ago you certainly could have given him a heads</p> <p>21 up?</p> <p>22 A Yes.</p> <p>23 Q And in this case you didn't give him a heads</p> <p>24 up about this.</p> <p>25 A Evidently not.</p>	<p style="text-align: right;">Page 1264</p> <p>1 BY MR. CARTA:</p> <p>2 Q I'm going to ask you about the middle one, to</p> <p>3 help you focus.</p> <p>4 A Let me get the context, if you don't mind.</p> <p>5 Q Please do.</p> <p>6 A Thank you.</p> <p>7 THE COURT: Is that Exhibit 130, Mark?</p> <p>8 MR. CARTA: Yes, 130.</p> <p>9 THE WITNESS: Okay, thank you.</p> <p>10 BY MR. CARTA:</p> <p>11 Q If you look at the e-mail that you sent to Mr.</p> <p>12 Shimkus, that is dated February 2007.</p> <p>13 A Yes, February 11, 2007.</p> <p>14 Q And who was the DPE on the WellPoint account</p> <p>15 at that point? Mike Morin, wasn't he?</p> <p>16 A Yes. Mike resigned in March.</p> <p>17 Q The end of March?</p> <p>18 A Yes.</p> <p>19 Q So Mr. -- at this point in time Mike Morin was</p> <p>20 the person who you said was the most important person</p> <p>21 on the account, right?</p> <p>22 A He was a very important person on the account.</p> <p>23 Q Well, I'm sorry, I thought just a few minutes</p> <p>24 ago you said to the jury that the DPE on the WellPoint</p> <p>25 was the most important role on WellPoint. Didn't you</p>

<p style="text-align: right;">Page 1265</p> <p>1 just say that?</p> <p>2 A Yes, I did, I did.</p> <p>3 Q So at this point Mr. Morin was the most</p> <p>4 important person on the WellPoint account?</p> <p>5 A That role was the most important role on the</p> <p>6 account, absolutely, at that point in time.</p> <p>7 Q And would you please read the first two</p> <p>8 sentences of your e-mail to Mr. Zapfel.</p> <p>9 A "Bob, please call Mark today. Mark and his</p> <p>10 leadership team have lost confidence in more than our</p> <p>11 storage team. They've lost confidence in IBM's</p> <p>12 ability to support WellPoint."</p> <p>13 Q So let's back up a little bit, because you</p> <p>14 read the whole thing. This initially has to do with</p> <p>15 the storage area issue, doesn't it, the SAN issue?</p> <p>16 A It started -- yes.</p> <p>17 Q And the initial problem was trying to resolve</p> <p>18 that storage issue, wasn't it?</p> <p>19 A Yes.</p> <p>20 Q And you went on to say, however, that the</p> <p>21 problem was way more than just the storage team, the</p> <p>22 problem at this time when Mr. Morin was still there</p> <p>23 was that IBM -- rather that WellPoint had lost</p> <p>24 confidence in IBM's ability to support all of</p> <p>25 WellPoint, isn't that correct?</p>	<p style="text-align: right;">Page 1267</p> <p>1 was issued right after Bob Zapfel's report?</p> <p>2 A I don't recall one of June of 2006. I got on</p> <p>3 the account July of 2006.</p> <p>4 Q And when you got on the account, I assume that</p> <p>5 you read what you could to find out what the scope of</p> <p>6 the problems were, isn't that right?</p> <p>7 A I'm sure I did.</p> <p>8 Q And you read that the WellPoint account was in</p> <p>9 dire financial straits?</p> <p>10 A I knew we had very serious problems when I</p> <p>11 accepted the job in July of 2006. I knew that we had</p> <p>12 a number of delivery problems and that we had</p> <p>13 financial problems with the contract. I knew both of</p> <p>14 those things, and part of my job was to help get</p> <p>15 everything back on track.</p> <p>16 Q I'd like to ask you if you recognize the</p> <p>17 specific problems that are identified on page 16 of</p> <p>18 the Red Team Review because they relate to the SWAT</p> <p>19 team calls that you were talking about earlier?</p> <p>20 MR. DUFFIELD: Your Honor, objection.</p> <p>21 She already testified she didn't see this document.</p> <p>22 THE WITNESS: I don't recall seeing it.</p> <p>23 I don't have it in front of me.</p> <p>24 MR. CARTA: Your Honor, she doesn't need</p> <p>25 to have seen the document. The document identifies</p>
<p style="text-align: right;">Page 1266</p> <p>1 A That's what I say in this e-mail, that's</p> <p>2 correct.</p> <p>3 Q And that was your assessment at the time, that</p> <p>4 WellPoint had lost confidence in IBM's ability to do</p> <p>5 the job?</p> <p>6 A Yes.</p> <p>7 Q Before Mr. Castelluccio was DPE?</p> <p>8 A That's right.</p> <p>9 Q I'd like to spend no more than a minute or two</p> <p>10 on the Red Team Review. We've all heard about this a</p> <p>11 great deal, but I do have one or two questions.</p> <p>12 MR. DUFFIELD: Your Honor, I'm going to</p> <p>13 object. This is, one, completely irrelevant; two,</p> <p>14 it's beyond the scope of the direct examination, and</p> <p>15 we've heard lots of testimony about this review</p> <p>16 already.</p> <p>17 THE COURT: I don't know what the</p> <p>18 question is. I haven't heard the question.</p> <p>19 MR. CARTA: I'm going to ask --</p> <p>20 THE COURT: Just ask the question.</p> <p>21 BY MR. CARTA:</p> <p>22 Q Are you familiar with the Red Team Review?</p> <p>23 A I recall having multiple Red Team Reviews at</p> <p>24 WellPoint over the years.</p> <p>25 Q Do you recall one dated June 21st, 2006, which</p>	<p style="text-align: right;">Page 1268</p> <p>1 the causes of the SWAT teams, and I want to just go</p> <p>2 through those with her.</p> <p>3 THE COURT: There's no question pending,</p> <p>4 though.</p> <p>5 BY MR. CARTA:</p> <p>6 Q Can I have that exhibit, please?</p> <p>7 MR. DUFFIELD: Mr. Carta, what exhibit is</p> <p>8 it?</p> <p>9 MR. CARTA: It's the Red Team Review.</p> <p>10 MR. DUFFIELD: But what exhibit number?</p> <p>11 MR. CARTA: Plaintiff's 17.</p> <p>12 MR. DUFFIELD: Thank you.</p> <p>13 THE WITNESS: So look at number 17?</p> <p>14 MR. CARTA: Yes.</p> <p>15 THE WITNESS: Okay.</p> <p>16 BY MR. CARTA:</p> <p>17 Q All I'm going to do is ask you about this</p> <p>18 page, but if you want to look at the whole document,</p> <p>19 please feel free.</p> <p>20 A I'm fine. 17?</p> <p>21 Q I'm sorry, page 16.</p> <p>22 A Okay. I don't think my pages are numbered.</p> <p>23 Q It's down in this area here. It's hard to</p> <p>24 see.</p> <p>25 A I see, thank you. Okay.</p>

Page 1269	Page 1271
<p>1 Q You see in the Red Team Review identified five 2 different areas where there had been no due diligence 3 performed in connection with the WellPoint contract? 4 A I see what the chart says. 5 Q Right. And one of those areas is Middleware 6 support. What's Middleware support? 7 A Middleware is software that -- it's software. 8 Q And was the Middleware support area one of the 9 areas where there were what you called SWAT team 10 calls? 11 A I'm sure there were SWAT calls around 12 Middleware. I don't recall specifically SWAT calls 13 about it, but I'm sure there were. 14 Q And DBA support, what's that area? 15 A Database administration support. 16 Q And did that also include storage? 17 A Database support, I wouldn't consider that 18 storage, no. I wouldn't consider that storage. 19 Q And was this other area where there was no due 20 diligence performed, was that also an area where there 21 were SWAT calls resulting from problems in that area? 22 A I don't remember specific SWAT calls about DBA 23 support, or Middle -- I don't remember specific SWAT 24 calls about any of these areas, per se. 25 Q Well, let's look at the Lotus notes and</p>	<p>1 with. FTE is full-time equivalent. This says FTP. 2 Q Full-time persons? 3 A Probably. I guess that's what that means. 4 Q The estimate was that in order to solve these 5 problems, they needed another 127 full-time persons, 6 isn't that right? 7 A Again, I wasn't involved. I was not on the 8 account when this report was done, and I truly don't 9 recall ever seeing this because I don't remember 10 either of these names. 11 Q And there were no -- nothing like 127 new 12 people assigned to the account after this, were there? 13 A I don't know. 14 Q You don't know? 15 A I don't know. 16 Q Would you take a moment and look at 17 Plaintiff's 111. 18 A Okay. Give me one moment, please. 19 Q Certainly. 20 A Okay. 21 Q And this e-mail is dated March 21, 2007? 22 A Yes. 23 Q And that would be the day after Mike Morin 24 resigned, is that correct? 25 A He formally resigned yesterday, so, yes.</p>
Page 1270	Page 1272
<p>1 exchange. That has to do with the e-mail system, 2 right? 3 A Yes. 4 Q And that was probably the largest source of 5 outage calls or SWAT calls, wasn't it, failures in the 6 e-mail system? 7 A I wouldn't say it was the largest. It would 8 be one of the most visible because everybody uses 9 e-mail, but I don't know that it was the largest. 10 Q Not in terms of largest in terms of number, 11 but the highest profile. 12 A It was very high profile. 13 Q And again, that's an area where the Red Team 14 Review that there had been no due diligence performed, 15 right? 16 A That's what this chart says. 17 And by the way, I don't recognize the two 18 people, Robert Gonzales and Lynn Small, I've never 19 heard of either of them, who were the names on the 20 front of the report. 21 Q And do you see right below there where it says 22 "Summary, Additional 127 FTPs"? What's FTP stand for? 23 Full-time equivalents? 24 A I would say FTE would be full-time equivalent. 25 That's why I'm staring at it. FTP I'm not familiar</p>	<p>1 Q And this is an e-mail that you sent to Mr. 2 Zapfel and Joanne Collins-Smee, is that right? 3 A Yes. 4 Q And in your e-mail you state to Ms. 5 Collins-Smee and to Mr. Zapfel, "I suggest you both 6 have ELs." What's EL stand for? 7 A It's EI, and EI is -- it's executive 8 interview. It means have a meeting, have a one-on-one 9 type of discussion. 10 Q So like an exit interview in this case? 11 A An executive interview is not what I consider 12 an exit interview, but I wanted them both to talk to 13 Mike and hopefully persuade him to stay with IBM. 14 Mike was a very valued employee of IBM's. 15 Q So "I suggest you both have executive 16 interviews with him --" being Mike Morin "-- as soon 17 as possible," right? 18 A Um-hmm. 19 Q "His reason is work life --" I'm sorry, I'm 20 going to skip a sentence. 21 "He will provide you with a very clear view of 22 the serious delivery issues that he does not think we 23 are addressing at WellPoint. He spent an hour doing a 24 core dump with me." 25 What's a -- what do you mean by "a core dump"?</p>

<p style="text-align: right;">Page 1273</p> <p>1 A It's like everything that's in your head goes 2 out. It's a dump. 3 Q "He says he feels that our delivery 4 organization is a disgrace and that we are not 5 addressing the issues and he cannot continue to 6 represent delivery to our customer." 7 Do you remember him saying that to you? 8 A I remember Mike -- I don't remember the exact 9 statement, but I remember Mike was very tired, very 10 discouraged. It was a very tough account. We were 11 all tired. Mike had been there longer than me, for 12 example. So I can remember Mike -- he was very tired, 13 very discharged. 14 Q And do you remember him giving you a core dump 15 and explaining to you why he thought there were 16 serious delivery deficiencies? 17 A I remember talking to Mike, and I remember he 18 was very emotional. He was at wits end, and he was 19 tired. He was tired. It was a tough -- it was a very 20 tough account. 21 Q And you're suggesting that Mr. Zapfel and 22 Joanne Collins-Smee talk to him because he spent so 23 much time explaining to you what he saw the problems 24 were, and you wanted to also make sure that they heard 25 his assessment of the problems, isn't that correct?</p>	<p style="text-align: right;">Page 1275</p> <p>1 that Gordon made and brought enormous value to. We 2 would get on SWAT call after SWAT call and it was 3 exhausting, and we would work very hard to get the 4 client back up and running. But we didn't focus 5 enough under Mike Morin's leadership, in my view, on 6 solving the root cause problem, so we had fewer SWAT 7 calls to get on. I was interested in let's solve the 8 underlying problems so we have fewer of these outages 9 so we have fewer SWAT calls to get on. So I was on 10 let's get to the root cause and fix the problem, 11 Mike's view was let's keep throwing people at it. He 12 and I did not agree. We could have thrown tons of 13 people at it, but if we didn't identify and fix the 14 problems, no matter how many people we had, we had too 15 many problems. 16 Q So you were pleased with the fact that Mike 17 Morin was on a lot of the SWAT calls, all the major 18 calls. 19 A Mike showed enormous commitment to the client, 20 and he showed a great deal of leadership on those SWAT 21 calls. He was -- he was calm, cool, collected, and 22 helped get us back up. Yes, I was very pleased that 23 he did that. 24 Q So try to answer my questions if you can so we 25 can move along.</p>
<p style="text-align: right;">Page 1274</p> <p>1 A I definitely wanted them to talk with him. 2 And I wanted them to talk to him for multiple reasons. 3 I wanted us to try to keep Mike in IBM. Again, Mike 4 is a very valid and very fine employee. And I for 5 sure wanted them to hear his view of our problems so 6 they could continue to help. 7 Q Precisely. So that one of the reasons was you 8 wanted to be sure that they heard his view of what was 9 going on? 10 A Yes. 11 Q And that was a view that you agreed with, 12 wasn't it? 13 A I certainly agreed that we had problems that 14 we needed to address. I would not say that I agreed 15 with every solution that Mike felt was appropriate. I 16 don't -- I did not say that, no. 17 Q You agreed with the fact that there had been a 18 lack of seriously addressing the needed -- need for 19 additional resources. Did he explain that to you? 20 Question withdrawn. 21 Did Mr. -- 22 A Mike and I had a difference of opinion on that 23 topic for sure. I don't know precisely how many 24 resources we did or didn't need, but I know one thing, 25 that we were not doing well enough, and this is a role</p>	<p style="text-align: right;">Page 1276</p> <p>1 A Sure. I will. 2 Q Thank you. So you were pleased with the role 3 he played in terms of SWAT calls? 4 A Yes. 5 Q But you were displeased with his ability to 6 identify root causes and come up with solutions to 7 those problems, isn't that correct? 8 A I wouldn't say I was displeased. What I would 9 say is I felt like we needed more focus on solving the 10 root cause problems than -- and Mike was more focused 11 on throwing people at it. So he and I had a 12 difference of opinion. 13 Q So it was sort of a question of priorities. 14 You felt that what was needed at this point was 15 finding reasons to stop the SWAT calls rather than 16 just being on them, isn't that correct? 17 A I wanted to stop -- I wanted to solve the 18 problem so we had less outages, and less outages would 19 mean fewer SWAT calls. It's more about the outages 20 than it was the SWAT calls. 21 Q And that was your assessment of what needed to 22 be done and what Mike Morin failed to do, is that 23 fair? 24 A Mike -- I think Mike did some of it, but I 25 don't think Mike did enough of it, and I think when</p>



Page 1277	Page 1279
<p>1 Gordon got on the account, he did a great job.</p> <p>2 Q Very good.</p> <p>3 A He took time, but he did a great job.</p> <p>4 Q I'm sorry?</p> <p>5 A He took time, but he did a great job.</p> <p>6 Q Let's go to Exhibit 56.</p> <p>7 A Okay.</p> <p>8 Q This is a -- I'm sorry, Defendant's 56, so</p> <p>9 it's the other book.</p> <p>10 A Okay.</p> <p>11 Q This is an e-mail exchange between you and Mr.</p> <p>12 Boxer on May 23rd and 24th, is that right?</p> <p>13 A Yes.</p> <p>14 Q That's about a month -- actually about two</p> <p>15 months after Mike Morin resigned?</p> <p>16 A Okay.</p> <p>17 Q And in Mr. Boxer's e-mail he refers to a voice</p> <p>18 message that you left him, is that correct?</p> <p>19 A Yes.</p> <p>20 Q And isn't it true that in your voice message</p> <p>21 you indicated to Mr. Boxer that Mr. Castelluccio was</p> <p>22 assigned to WellPoint 70 percent of the time, isn't</p> <p>23 that true?</p> <p>24 A His e-mail to me says, "Keenie, got your</p> <p>25 voicemail. In meetings in Indiana. If he is 70</p>	<p>1 not been full-time on WellPoint," and then you go on</p> <p>2 to ask, "Can I tell Boxer that effective June 1 Jim</p> <p>3 will have completed all his transition activities and</p> <p>4 he is full-time acting DPE for WellPoint as we</p> <p>5 continue to work through the permanent backfill?"</p> <p>6 That's the e-mail you wrote, is that correct?</p> <p>7 A That's correct.</p> <p>8 Q And this is in May of 2007, right?</p> <p>9 A May 24th.</p> <p>10 Q And when you say "as we work through the</p> <p>11 permanent backfill," you're talking about a permanent</p> <p>12 person to take Mr. Morin's position, isn't that</p> <p>13 correct?</p> <p>14 A Yes.</p> <p>15 Q So in May of 2007 your e-mail indicates that</p> <p>16 you were looking for someone permanent to take Mr.</p> <p>17 Morin's position, isn't that right?</p> <p>18 A Yes.</p> <p>19 Q Defendant's Exhibit 57, please.</p> <p>20 I think this actually an e-mail that you had</p> <p>21 in your direct examination, but take a moment and</p> <p>22 review it, please.</p> <p>23 A Okay.</p> <p>24 Okay.</p> <p>25 Q And this is an e-mail that you sent, correct?</p>
Page 1278	Page 1280
<p>1 percent why is he never on the call?"</p> <p>2 I don't remember the specific message I left</p> <p>3 Mark, but that's what his e-mail to me says.</p> <p>4 Q You agree that his e-mail indicates that you</p> <p>5 had said to him in a voicemail that Mr. Castelluccio</p> <p>6 was on that account 70 percent of the time, right?</p> <p>7 A I don't remember if I told him -- I don't know</p> <p>8 if I told him that in that voicemail or if he and I</p> <p>9 had a prior conversation about that, but in this note,</p> <p>10 he indicates that Jim is on 70 percent.</p> <p>11 Q And that that was the information he got you,</p> <p>12 isn't that correct?</p> <p>13 A Probably, yes.</p> <p>14 Q Exhibit 55, please.</p> <p>15 A Okay.</p> <p>16 Q Defendant's 55. Same notebook.</p> <p>17 A Okay.</p> <p>18 Q Can you identify this as an e-mail that you</p> <p>19 sent the same day, May 24th, to Mr. Castelluccio and</p> <p>20 Ms. Collins-Smee to Mr. Liederbach?</p> <p>21 A I did.</p> <p>22 Q And in it you indicate that, "I've talked with</p> <p>23 you all about the fact I committed to Boxer a while</p> <p>24 ago that Jim would be full-time on WellPoint," and</p> <p>25 then the highlighted section is, "You'll see Jim has</p>	<p>1 A Yes, it is.</p> <p>2 Q And you sent it to Mr. Zapfel, Ms.</p> <p>3 Collins-Smee and to Mr. Liederbach, correct?</p> <p>4 A Yes.</p> <p>5 Q And again, in this e-mail you say, "This</p> <p>6 temporary approach with Jim Castelluccio is not</p> <p>7 working," isn't that correct?</p> <p>8 A Yes.</p> <p>9 Q Defendant's Exhibit 62, please.</p> <p>10 Again, I'd just ask you to take whatever time</p> <p>11 you need to review those two e-mails.</p> <p>12 A Okay.</p> <p>13 THE COURT: I suppose this is as good a</p> <p>14 time as any to let you know that I've been informed</p> <p>15 that Chief Judge Hall has closed the courts at 3:30,</p> <p>16 effective 3:30.</p> <p>17 MR. CARTA: I think I can move it along,</p> <p>18 Your Honor.</p> <p>19 THE COURT: Okay. As long as we can get</p> <p>20 a cross, and a redirect is not as important, but we've</p> <p>21 got to have time for the cross.</p> <p>22 BY MR. CARTA:</p> <p>23 Q So have you had chance to look at Exhibit 62?</p> <p>24 A I have.</p> <p>25 Q Thank you. And this e-mail, they're both</p>



<p style="text-align: right;">Page 1281</p> <p>1 actually dated August of 2007.</p> <p>2 A Yes.</p> <p>3 Q So this was a full five months after Mr. Morin</p> <p>4 resigned, correct?</p> <p>5 A Yes.</p> <p>6 Q And these e-mails both address the problem</p> <p>7 with IBM's, quote, storage space at WellPoint.</p> <p>8 A Yes.</p> <p>9 Q And what is meant by storage space? What's</p> <p>10 the issue there?</p> <p>11 A Storage is where you keep all of the</p> <p>12 information. It's the disk drives and tape, where we</p> <p>13 keep all the information.</p> <p>14 Q And in the bottom there's an e-mail from Mr.</p> <p>15 Boxer to -- well, it's copied to you, right?</p> <p>16 A Yes, copied to me.</p> <p>17 Q And in that e-mail Mr. Boxer states, quote, I</p> <p>18 think we are seriously hamstrung right now by the gap</p> <p>19 that exists in a permanent assignment of the new</p> <p>20 delivery executive, isn't that correct?</p> <p>21 A He says that.</p> <p>22 Q And at that point Mr. Boxer had already</p> <p>23 rejected, if you recall, a number of proposed</p> <p>24 candidates, isn't that right?</p> <p>25 A Mark had looked at some candidates and had</p>	<p style="text-align: right;">Page 1283</p> <p>1 good, experienced."</p> <p>2 A Okay.</p> <p>3 Q Does this refresh your recollection that at</p> <p>4 this point you were encouraging Mr. Boxer to consider</p> <p>5 Ray Johnson as yet another candidate for the permanent</p> <p>6 DPE position on WellPoint?</p> <p>7 A I was encouraging him to be open-minded when</p> <p>8 he talked to Ray, yes, about the job.</p> <p>9 Q And Mr. Boxer -- you were responding to Mr.</p> <p>10 Boxer's statement, and I quote, if our candidate this</p> <p>11 week does not cut it, time is up. Do you remember</p> <p>12 receiving that?</p> <p>13 A I don't remember receiving it, but I certainly</p> <p>14 did get it.</p> <p>15 Q I'm sorry, what?</p> <p>16 A Yes.</p> <p>17 Q You certainly did receive it?</p> <p>18 A I certainly did receive it, yes.</p> <p>19 Q And you not only got it in terms of got the</p> <p>20 e-mail, but you got the message, too, didn't you, that</p> <p>21 he was at wits end and he wanted a permanent person</p> <p>22 assigned yesterday?</p> <p>23 A He wanted a new DPE, permanent DPE assigned to</p> <p>24 the account, yes.</p> <p>25 Q And ultimately am I correct that Mr. Boxer</p>
<p style="text-align: right;">Page 1282</p> <p>1 rejected some candidates, yes.</p> <p>2 Q Do you remember if he rejected Ken Weiss?</p> <p>3 A He did.</p> <p>4 Q And Robert Jones?</p> <p>5 A I don't remember the name Robert Jones. I</p> <p>6 remember Ken Weiss.</p> <p>7 Q Do you remember Rick DeLeo?</p> <p>8 A I remember that name.</p> <p>9 Q Exhibit 62. Defendant's Exhibit 62.</p> <p>10 A I think that was 62.</p> <p>11 Q I'm sorry, this is actually Plaintiff's 62.</p> <p>12 A Okay.</p> <p>13 Okay.</p> <p>14 Q Can you identify this as an exchange of</p> <p>15 e-mails between you and Mr. Boxer on August 21st and</p> <p>16 August 22nd?</p> <p>17 A Yes. Mark sent me a note on the 21st and I</p> <p>18 sent him one the next day, the 22nd.</p> <p>19 Q And in his e-mail, this e-mail concerns</p> <p>20 specifically a reference to Ray. Was that Ray</p> <p>21 Johnson, who's also one of the candidates that Mr.</p> <p>22 Boxer ultimately rejected?</p> <p>23 A I don't see a reference to Ray.</p> <p>24 Q At the top, "Please call me tomorrow, ask you</p> <p>25 talk to Ray and we'll discuss, be open-minded, he is</p>	<p style="text-align: right;">Page 1284</p> <p>1 rejected Ray Johnson?</p> <p>2 A He did, yes.</p> <p>3 Q Plaintiff's Exhibit 61.</p> <p>4 A Okay.</p> <p>5 Q This is a string of e-mails extending from</p> <p>6 August 31st to September 4th, and if you'd just take a</p> <p>7 moment and review it quickly. This is my last e-mail.</p> <p>8 A This is a long one.</p> <p>9 Q Yeah.</p> <p>10 A Okay.</p> <p>11 Q And if you would look at your e-mail which is</p> <p>12 on the bottom of the third page, there's a highlighted</p> <p>13 sentence there. It's an e-mail dated 9/2/2007 from</p> <p>14 yourself to Mr. Zapfel.</p> <p>15 A Um-hmm.</p> <p>16 Q And in that you -- in that e-mail you state,</p> <p>17 "The permanent delivery project executive, DPE, role</p> <p>18 for WellPoint has been open since April 1st," isn't</p> <p>19 that correct?</p> <p>20 A Yes.</p> <p>21 Q And I'll read a little further. "Mark Boxer</p> <p>22 has taken a position that WellPoint will not do any</p> <p>23 business with any part of IBM until WellPoint has a</p> <p>24 top notch DPE."</p> <p>25 Do you remember Mr. Boxer taking that</p>

Page 1285	Page 1287
<p>1 position?</p> <p>2 A I do.</p> <p>3 Q And on the next page, in your e-mail to Mr.</p> <p>4 Zapfel you state, "Bob, I think the only way we are</p> <p>5 going to get Boxer comfortable with a DPE is for the</p> <p>6 person to have your personal seal of approval, someone</p> <p>7 you have worked with or personally interviewed to</p> <p>8 determine is the one for the job."</p> <p>9 Do you remember indicating that to Mr. Zapfel?</p> <p>10 A I do.</p> <p>11 Q And am I correct that Gordon Crawford was</p> <p>12 presented by Mr. Zapfel to Boxer as someone with his</p> <p>13 personal stamp of approval?</p> <p>14 A He was.</p> <p>15 Q He was. And Mr. Zapfel was the one to</p> <p>16 introduce Mr. Crawford directly to Mr. Boxer, isn't</p> <p>17 that correct?</p> <p>18 A I think Joanne and I did.</p> <p>19 Q And Mr. Zapfel was the one who indicated that</p> <p>20 this was the person who -- I realize our time is up,</p> <p>21 but this is the person who I personally stand behind,</p> <p>22 isn't that right?</p> <p>23 A He did stand behind him.</p> <p>24 Q And he was Mr. Crawford's advocate to Mr.</p> <p>25 Boxer, isn't that right?</p>	<p>1 THE WITNESS: When I was coming up they</p> <p>2 were, so be careful.</p> <p>3 THE COURT: Okay, gentlemen, court is</p> <p>4 closed officially by the Chief Judge, 3:30, nothing we</p> <p>5 can do it about. Let's shoot for starting at 11</p> <p>6 o'clock tomorrow. That's an hour delay. That'll give</p> <p>7 us time. If it has to be even later, the clerk and my</p> <p>8 law clerks, some of whom or one of them or all of</p> <p>9 them, will let the jury know and we'll let counsel</p> <p>10 know.</p> <p>11 MR. FASMAN: We'll hear from the court</p> <p>12 then?</p> <p>13 THE COURT: Yes.</p> <p>14 MR. FASMAN: If it's later than 11.</p> <p>15 THE COURT: Yeah, if we move it to 11:30</p> <p>16 or 12, we'll let you know.</p> <p>17 MR. FASMAN: Okay.</p> <p>18 THE COURT: But it's 11 o'clock now. Be</p> <p>19 safe driving, wherever it is you're driving, and we'll</p> <p>20 stand adjourned for the day.</p> <p>21 MR. FASMAN: Thank you, Your Honor.</p> <p>22 MR. CARTA: Thank you.</p> <p>23 THE COURT: Thanks, ladies and gentlemen.</p> <p>24 Don't talk about the case, don't deliberate, keep an</p> <p>25 open mind, have some fun, frolic in the snow tomorrow,</p>
Page 1286	Page 1288
<p>1 A He was. He had also been Rick DeLeo's</p> <p>2 advocate, and the advocate of so many other candidates</p> <p>3 that we had put up in front of Mark that Mark</p> <p>4 rejected. I mean, so, yes, Gordon had Bob Zapfel's</p> <p>5 permanent blessing, and so did some of the other ones</p> <p>6 that Mark rejected.</p> <p>7 Q But at this particular time this was critical</p> <p>8 that a person be presented, according to you, you're</p> <p>9 asking Mr. Zapfel to give his personal stamp of</p> <p>10 approval, and that's what he did with respect to Mr.</p> <p>11 Crawford, right?</p> <p>12 A He did.</p> <p>13 MR. CARTA: No further questions.</p> <p>14 THE COURT: Thank you, Mr. Carta.</p> <p>15 Counsel?</p> <p>16 MR. DUFFIELD: No further questions, Your</p> <p>17 Honor.</p> <p>18 THE COURT: All right, Ms. McDonald,</p> <p>19 thank you so much for being with us here this</p> <p>20 afternoon. You have a distance to fly?</p> <p>21 THE WITNESS: I don't. I'm going to</p> <p>22 blast right out of here. I hope everybody has a safe</p> <p>23 drive home.</p> <p>24 THE COURT: I think the roads are going</p> <p>25 to start getting slippery.</p>	<p>1 make snowmen.</p> <p>2 (Jurors excused)</p> <p>3 THE COURT: Okay, see you tomorrow.</p> <p>4 MR. FASMAN: Thank you, Your Honor.</p> <p>5 THE COURT: You're welcome.</p> <p>6 (Court adjourned)</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

Page 1289

CERTIFICATE OF REPORTER

I Hereby certify that the foregoing 168 pages  
are a complete and accurate computer-aided  
transcription of my original stenotype notes taken in  
the Matter of James Castelluccio VS International  
Business Machines Corporation, which was held before  
The Honorable Thomas P. Smith, U.S.M.J., at U.S.  
District Court, 450 Main Street, Hartford,  
Connecticut, on January 21, 2014.

Wendy Allen, RMR, CRR  
Notary Public

My commission expires: April 15, 2015

Page 1289

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

JAMES CASTELLUCCIO )  
Plaintiff ) 3:09-cv-01145 (TPS)  
)  
VS ) January 22, 2014  
INTERNATIONAL BUSINESS )  
MACHINES CORPORATION ) Federal Building  
Defendant ) Hartford, Connecticut

VOLUME 7  
TRIAL HELD BEFORE  
THE HONORABLE THOMAS P. SMITH, U.S.M.J.

Reporter: WENDY J. ALLEN, RPR, CRR, LSR #00221

Page 1291

I N D E X

WITNESSES:	PAGE:
Keith Holmes	
Direct Examination by Mr. Fasman.....	1299
Cross-Examination by Mr. Carta.....	1354
Redirect Examination by Mr. Fasman.....	1394
Recross Examination by Mr. Carta.....	1400
Redirect Examination by Mr. Fasman.....	1400
Gordon Crawford	
Direct Examination by Mr. Fasman.....	1402
Cross-Examination by Mr. Carta.....	1433
Russ Mandel	
Direct Examination by Mr. Fasman.....	1440

Page 1290

Representing the Plaintiff  
Carta McAlister & Moore, P.C.  
1120 Boston Post Road  
Post Office Box 83  
Darien, CT 06820  
By: Mark R. Carta, Esq.  
mark@cmm-law.com  
By: Margaret A. Triolo, Esq.  
margaret@cmm-law.com  
By: Troy Bailey, Esq.

Representing the Defendant  
Paul Hastings, LLP  
75 East 55th Street  
New York, NY 10022  
By: Zachary Fasman, Esq.  
Zacharyfasman@paulhastings.com  
By: Todd C. Duffield, Esq.  
Toddduffield@paulhastings.com  
By: Jean-Marie Gutierrez

ALSO PRESENT:

Daniel Fox, Esq.  
IBM in-house counsel

Page 1292

THE COURT: Are we ready to proceed?

MR. CARTA: I have one housekeeping matter. Before Mr. Mandel testifies, I'd like to be sure that we're all on the same page. I believe Mr. Fasman's already made his offer of proof, and I don't want to be put in a position where I'm objecting to questions that the Court has already ruled cannot be asked in front of the jury.

MR. FASMAN: Your Honor, I'm happy to take it up on a sidebar before we get to Mr. Mandel on the stand.

THE COURT: Okay.

MR. FASMAN: Let's do that afterwards or we can do it now.

(Conference held at sidebar)

MR. FASMAN: I think I have to establish that it's a business record. I have to ask him whether he maintained records, whether the records are kept in the ordinary normal course of business -- the report, et cetera, just in case. I don't want to end up -- if the jury rules against us and I go off on appeal, I don't want to have anybody say we didn't establish it was admissible anyhow.

MR. CARTA: I'll stipulate his documents were business records. So I don't think we need to

<p style="text-align: right;">Page 1293</p> <p>1 ask questions on that. I'll stipulate to that.</p> <p>2 THE COURT: So in other words, we need to</p> <p>3 ask these four foundation questions. Here's the way I</p> <p>4 have envisioned it, the way I would like to see this</p> <p>5 go down. He's part of HR department, and part of his</p> <p>6 duties are to investigate allegations of</p> <p>7 discrimination.</p> <p>8 MR. FASMAN: Correct, sir.</p> <p>9 THE COURT: He was made aware of the</p> <p>10 Plaintiff's allegation of discrimination, and in the</p> <p>11 normal course of his activities, he conducted an</p> <p>12 investigation. He did it because IBM believes in</p> <p>13 obeying the law, and he wanted to give forewarning and</p> <p>14 fair treatment to the allegations that were made.</p> <p>15 He conducted an investigation over a number of</p> <p>16 days. I don't know how many people he had with him or</p> <p>17 whether he did it himself or with other people. He</p> <p>18 interviewed people, and then his investigation was</p> <p>19 concluded.</p> <p>20 And at the conclusion of his investigation, he</p> <p>21 had discussions -- or IBM management had a discussion</p> <p>22 with Mr. Castelluccio to see if the problem could be</p> <p>23 worked out internally.</p> <p>24 MR. FASMAN: He didn't actually do that.</p> <p>25 We didn't do that. We reported to him what the</p>	<p style="text-align: right;">Page 1295</p> <p>1 THE COURT: Okay. When it was over, he</p> <p>2 communicated with Mr. Castelluccio in an attempt to</p> <p>3 see if the matter could be resolved within IBM.</p> <p>4 MR. FASMAN: I don't think I would go</p> <p>5 there, but that's okay. I think he just reported his</p> <p>6 findings.</p> <p>7 THE COURT: To see if the matter could be</p> <p>8 resolved.</p> <p>9 MR. CARTA: I don't think that actually</p> <p>10 happened.</p> <p>11 MR. FASMAN: I don't think -- there was</p> <p>12 no attempt at resolution.</p> <p>13 THE COURT: There was no attempt?</p> <p>14 MR. FASMAN: No. He just did the</p> <p>15 investigation and reported the findings and said --</p> <p>16 THE COURT: So you don't envision it</p> <p>17 going down the way I am.</p> <p>18 MR. FASMAN: Not quite.</p> <p>19 MR. CARTA: I think it just ends there.</p> <p>20 MR. FASMAN: That's right.</p> <p>21 MR. CARTA: It ends with the fact that he</p> <p>22 conducted the investigation. I mean, Your Honor, I'm</p> <p>23 just -- I want to be perfectly clear on this. I would</p> <p>24 be forced to move for a mistrial if we get into</p> <p>25 anything that relates to the conclusions.</p>
<p style="text-align: right;">Page 1294</p> <p>1 findings were.</p> <p>2 THE COURT: Okay. One of the -- see, I</p> <p>3 don't want to have you get into what the findings</p> <p>4 were.</p> <p>5 MR. FASMAN: No, no. All I said, Judge,</p> <p>6 was, all we did was tell Mr. Castelluccio.</p> <p>7 THE COURT: Okay. Mr. Castelluccio</p> <p>8 conducted his investigation.</p> <p>9 MR. CARTA: Mr. Mandel --</p> <p>10 MR. FASMAN: Mandel.</p> <p>11 MR. CARTA: -- conducted.</p> <p>12 THE COURT: Yes. Conducted the</p> <p>13 investigation. And the purpose of this was because</p> <p>14 IBM believes in the law and attempts to follow the</p> <p>15 law, but also it regards Mr. Castelluccio as a</p> <p>16 valuable employee. He worked there for 40 years, an</p> <p>17 IBMer, as we've heard people say, and they wanted to</p> <p>18 give his allegation the serious treatment that they</p> <p>19 deserve. When it was concluded, he met with</p> <p>20 Mr. Castelluccio.</p> <p>21 MR. CARTA: But he didn't.</p> <p>22 THE COURT: He didn't.</p> <p>23 MR. FASMAN: They spoke on the phone, and</p> <p>24 then there was a one-sentence letter that I think</p> <p>25 you've seen.</p>	<p style="text-align: right;">Page 1296</p> <p>1 Mr. Castelluccio was not asked any questions</p> <p>2 and I've not asked any of the other witnesses</p> <p>3 questions about their role in the investigation. So I</p> <p>4 just want it to be perfectly clear that was all --</p> <p>5 based upon my understanding, that we were not going to</p> <p>6 get into the conclusions of the investigation. And it</p> <p>7 sounds to me like it's a nonissue.</p> <p>8 MR. FASMAN: No. It's a nonissue, but</p> <p>9 the one exception is I am going to ask Mr. Mandel</p> <p>10 about his interview with Mr. Castelluccio, because in</p> <p>11 there, there's an admission against interest.</p> <p>12 THE COURT: Doesn't have to be against</p> <p>13 his interest.</p> <p>14 MR. FASMAN: It's not hearsay. It's not</p> <p>15 going to go into any detail.</p> <p>16 THE COURT: You can ask him anything</p> <p>17 unless it's privileged. If he said something, it's an</p> <p>18 admission.</p> <p>19 MR. FASMAN: Yes.</p> <p>20 THE COURT: So everything's gone right,</p> <p>21 and --</p> <p>22 MR. CARTA: That's why I wanted to raise</p> <p>23 the issue outside the presence of the jury.</p> <p>24 MR. FASMAN: No problem. The only other</p> <p>25 thing I would say, Judge, can I ask him how many</p>

<p style="text-align: right;">Page 1297</p> <p>1 people he interviewed?</p> <p>2 MR. CARTA: Your Honor, that suggests</p> <p>3 that he actually did conduct interviews that were</p> <p>4 balanced, and I don't think that that's the case. I</p> <p>5 think we heard that he only asked questions about</p> <p>6 performance. He never asked any questions about age</p> <p>7 discrimination.</p> <p>8 MR. FASMAN: Your Honor, I mean --</p> <p>9 THE COURT: I think we're going into the</p> <p>10 subject of the investigation. I don't want to do</p> <p>11 that. That's thin ice. It's enough that we talk</p> <p>12 about he investigated Mr. Castelluccio's allegations</p> <p>13 that he was being discriminated against because of his</p> <p>14 age, and he interviewed -- he conducted that</p> <p>15 investigation, and no other investigation, it involved</p> <p>16 his talking to 12 people.</p> <p>17 MR. FASMAN: Twenty.</p> <p>18 MR. CARTA: Twenty-one.</p> <p>19 MR. FASMAN: Twenty-one.</p> <p>20 THE COURT: Twenty-one. Okay.</p> <p>21 MR. FASMAN: That's as far as I'm going</p> <p>22 to go.</p> <p>23 THE COURT: I think that's all right.</p> <p>24 MR. FASMAN: Okay. Good. I just want to</p> <p>25 make sure.</p>	<p style="text-align: right;">Page 1299</p> <p>1 DIRECT EXAMINATION BY MR. FASMAN:</p> <p>2</p> <p>3 Q Mr. Holmes, good morning.</p> <p>4 A Good morning.</p> <p>5 Q Are you employed by IBM?</p> <p>6 A Yes, I am.</p> <p>7 Q And what's your current position, sir?</p> <p>8 A I'm a human resources partner for the Global</p> <p>9 Technology Services division.</p> <p>10 Q And how long have you held that job, sir?</p> <p>11 A I've held that job for roughly four years.</p> <p>12 Q And how long overall have you worked for IBM?</p> <p>13 A Fourteen years. I'm in my 15th year with IBM.</p> <p>14 Q Can you please describe your educational</p> <p>15 background after high school, sir?</p> <p>16 A Yes. I graduated from Brown University with</p> <p>17 degrees in economics and international relations.</p> <p>18 Several years after that -- after five years working</p> <p>19 professionally, I returned to school full-time and got</p> <p>20 an MBA from Yale University. And then a few years</p> <p>21 later, 2005, I earned a master's degree in human</p> <p>22 resources management from Rutgers.</p> <p>23 Q And were you employed prior to working for</p> <p>24 IBM?</p> <p>25 A Yes, I was.</p>
<p style="text-align: right;">Page 1298</p> <p>1 (Conference concluded at sidebar)</p> <p>2 (Jurors present)</p> <p>3 THE COURT: Good morning.</p> <p>4 THE JURORS: Good morning.</p> <p>5 THE COURT: Please be seated. You know</p> <p>6 we were in here at 11 o'clock, and we took care of</p> <p>7 some legal issues and saved us some time. And I'm</p> <p>8 glad to see that you all made it in safely.</p> <p>9 Okay. Let's begin, Mr. Fasman.</p> <p>10 MR. FASMAN: Your Honor, thank you.</p> <p>11 Good morning, everyone.</p> <p>12 THE JURORS: Morning.</p> <p>13 MR. FASMAN: IBM calls Keith Holmes as</p> <p>14 our next witness.</p> <p>15 (Keith Holmes, sworn by the clerk)</p> <p>16 THE CLERK: Please state your name, and</p> <p>17 spell your last name for the record.</p> <p>18 THE WITNESS: My name is Keith Holmes.</p> <p>19 My last name is spelled H-O-L-M-E-S.</p> <p>20 THE CLERK: Your business address?</p> <p>21 THE WITNESS: Is One New Orchard Road,</p> <p>22 Armonk, New York, IBM Corporation.</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 1300</p> <p>1 Q Can you briefly summarize for the jury what</p> <p>2 your jobs were prior to working for IBM, sir?</p> <p>3 A Yes. My first job out of college was to</p> <p>4 volunteer with the YMCA in Ghana, West Africa.</p> <p>5 After about a year doing that, I returned to</p> <p>6 the U.S. and took a job in banking with Bankers Trust.</p> <p>7 I worked there for a couple years, then moved to</p> <p>8 another bank, Broadway Bank, for a couple years. Then</p> <p>9 my next job after business school was also in banking,</p> <p>10 with Bankers Trust.</p> <p>11 Following that, I moved to American Express,</p> <p>12 where I worked for seven years in different sales and</p> <p>13 marketing jobs. And after American Express, I was in</p> <p>14 consulting for a couple years and then I moved to IBM.</p> <p>15 Q And so 14 years -- that would be, what, 19 --</p> <p>16 A 1999.</p> <p>17 Q -- '99 you came to IBM. And maybe you can</p> <p>18 briefly summarize -- because I know IBMers seem to</p> <p>19 move around every two years or so, so maybe you could</p> <p>20 briefly summarize for the jury, without going into</p> <p>21 every single move, just generally what you've done at</p> <p>22 IBM during the course of your career, sir.</p> <p>23 A Okay. I joined IBM in the human resources</p> <p>24 function where I was working with putting together</p> <p>25 sales compensation plans. I did that for several</p>



Page 1301	Page 1303
<p>1 years. Then I took my first IBM HR partner job. Did  2 that for a couple years, had an assignment in  3 headquarters doing human resource strategy. Then I  4 was the HR director for Integrated Technology Delivery  5 for several years, and then I moved into my current  6 job about four years ago.</p> <p>7 Q All right.</p> <p>8 A Half dozen assignments in that time.</p> <p>9 Q When you say "HR partner," that's a little  10 IBM-speak. Could you tell the jury and for the record  11 state what an HR partner is or does?</p> <p>12 A Yes.</p> <p>13 Q Or both?</p> <p>14 A Yes. A HR partner is a human resources  15 generalist. I work with the management team for the  16 different organizations to help them with everything  17 having to do with their people from hiring people to  18 training and developing people; to compensation; to  19 assessment; to coaching and performance management  20 through to separation, whether that's retirement,  21 resignation, or other.</p> <p>22 Q Now, I'd like to direct your attention to the  23 time when you were serving as a human resources  24 partner for ITD Americas. What period of time were  25 you in that job?</p>	<p>1 together, I sometimes talked to her daily or multiple  2 times a day.</p> <p>3 Q Were your offices close to each other?</p> <p>4 A Yes. We were in the same building on the same  5 floor, probably ten offices apart.</p> <p>6 Q In this position, when you were an HR partner  7 in this job, did you have a team of people reporting  8 to you?</p> <p>9 A Yes. Well, for some part of the time. There  10 were a group of HR partners that reported to me, and  11 it ranged from, I guess, a low of eight people to a  12 high of a dozen direct reports in that job.</p> <p>13 MR. FASMAN: Can we put up number 36,  14 please?</p> <p>15 MR. CARTA: Defendant's?</p> <p>16 MR. FASMAN: Yes.</p> <p>17 BY MR. FASMAN:</p> <p>18 Q Mr. Holmes, there are booklets there if you'd  19 like to see it in hard copy, but you can read off the  20 screen as well. This is Defendant's Exhibit Number  21 36.</p> <p>22 Do you recognize this document, sir?</p> <p>23 A Yes, I do.</p> <p>24 Q And what is it?</p> <p>25 A It's an e-mail from Joanne Collins-Smee to me</p>
Page 1302	Page 1304
<p>1 A That was from October 2007 to midyear 2009.</p> <p>2 Q Was it --</p> <p>3 A Or 2006 -- October 2006. I'm sorry.</p> <p>4 Q And who was the general manager of ITD  5 Americas when you took over?</p> <p>6 A That was Kelton Jones.</p> <p>7 Q And you described your partnering duties.  8 Were those the duties that you performed on behalf  9 of -- in supporting the ITD Americas organization?</p> <p>10 A Yes. It was an HR generalist job.</p> <p>11 Q And how long was Mr. Jones the manager of  12 ITDelivery in the Americas while you were employed?</p> <p>13 A Roughly, four months.</p> <p>14 Q And then I think we've heard that  15 Joanne Collins-Smee took over in February of 2007,  16 right?</p> <p>17 A Right. That's correct.</p> <p>18 Q And you were her HR partner thereafter, right?</p> <p>19 A Yes. She came in, and I continued to support  20 her in the same role.</p> <p>21 Q So in your role working with Ms. Collins-Smee,  22 how frequently would you have contact with her?</p> <p>23 A It varied. Initially, it was probably  24 multiple times a week. But over time, as she and I  25 got involved in more things and worked on more things</p>	<p>1 from late February 2007.</p> <p>2 Q Now, the e-mail is dated February 28th, 2007,  3 apparently almost 4 in the morning. And I call your  4 attention to the highlighted portion, which says --  5 well, let me go back for a minute, okay? Let's go  6 back to the first sentence, not the highlighted  7 portion.</p> <p>8 "Dave L has requested this" -- this is the  9 replacement of Mr. Castelluccio -- "I will fill you in  10 tomorrow - Dave L has requested this, had asked months  11 ago from Kelton but, no action."</p> <p>12 Were you aware that he had requested a change  13 in management from Mr. Jones?</p> <p>14 A No, I was not aware of that.</p> <p>15 Q Now, the next -- let's go to the next  16 sentence: "I spoke to Jim C today - he understands  17 and also wants to move, he knew for a while that it  18 was not working."</p> <p>19 Now, did you discuss this e-mail with  20 Ms. Collins-Smee?</p> <p>21 A Yes.</p> <p>22 Q Presumably not at 4 in the morning.</p> <p>23 A No. But --</p> <p>24 Q Do you remember discussing it with her?</p> <p>25 A Yes, I do. Because of the content of the</p>

<p style="text-align: right;">Page 1305</p> <p>1 e-mail, I made it a point to connect with her quickly.  2 I think it was the next business day. And we did talk  3 about the e-mail and the content.  4 Q Do you remember discussing the highlighted  5 sentence with her, that she spoke to Mr. Castelluccio?  6 Did that subject come up in your discussion with her?  7 A Yes. That was part of the conversation.  8 "I'll fill you in tomorrow," that was one of the  9 things we talked about. She shared some of the  10 background. She told me about the conversations she  11 had had with Dave and talked about what we would do  12 next.  13 Q Did she talk about her conversation with  14 Mr. Castelluccio?  15 A Yes, she did.  16 Q Tell the jury what you recall about that  17 portion of the conversation.  18 A Well, she essentially just restated and  19 clarified what's in the memo, that she had had a  20 conversation with Jim following up her conversation  21 with Dave, and that was the impression that she got,  22 was that he understood and that he, too, felt that  23 there were issues and was ready for a change.  24 Q Now, in this e-mail, she asked you to pull a  25 slate for Jim's replacement. Can you explain to the</p>	<p style="text-align: right;">Page 1307</p> <p>1 a -- the purpose of the slate was to identify  2 candidates that they would eventually interview and  3 presumably pull someone or hire someone from that  4 list.  5 Q So the actual pull of candidate names ends up,  6 I presume, with a fairly substantial list.  7 A It can, yes. I have seen first pulls from the  8 database that were 25, 30 names, which is more than  9 anybody would really want to have to deal with.  10 Q And are those people considered for positions?  11 A They can be. Again, the list of -- from that  12 list of 30, some of them would simply be eliminated by  13 me or by the person pulling the list just for obvious  14 reasons: if they didn't fit, if they didn't have --  15 if they weren't at the right band level for the job,  16 or for other reasons where the computer pulled them  17 but they weren't a good match.  18 But essentially, everyone who was on the list  19 that we shared with the manager got the manager's  20 review, which I think is, in fact, consideration in  21 the process.  22 Q Now, we've -- the jury has heard a lot about  23 5-minute drills, but I don't think there's been one in  24 front of the ladies and gentlemen of the jury. So  25 maybe we could take just a quick look at Defendant's</p>
<p style="text-align: right;">Page 1306</p> <p>1 jury how you would go about pulling a slate for his  2 replacement?  3 A Well, a slate is essentially a list of folks  4 that we would identify as candidates to go into a job.  5 And so I would start by working with a person who had  6 access to a database whose job it was to do this kind  7 of work. And so we would build a profile -- a list of  8 the skills and the experience we thought was necessary  9 for the job. That person would put that into her  10 database, and it would pull a list of people.  11 Once we had that initial database pulled, we  12 would look through it. We would make some judgment as  13 to which of those names that were just pulled by the  14 computer really made sense. Then we would narrow that  15 down, sort it -- essentially, sort it into what we  16 thought were the strong candidates from that list and  17 what were weaker candidates. And then we'd share it  18 with the person who was actually going to hire for the  19 job.  20 Q And the hiring manager would have some say on  21 who was appropriately on the list or not?  22 A Yes. Absolutely. Once we pulled the slate,  23 the hiring manager could take people off because he or  24 she felt that they weren't appropriate or they could  25 add people to it. So they could refine it, and get</p>	<p style="text-align: right;">Page 1308</p> <p>1 Exhibit Number 78.  2 I don't know if you can see this. You'll have  3 it in your exhibit books at the end.  4 But Mr. Holmes, do you have that in front of  5 you?  6 A Yes, I do.  7 Q Why don't you -- let's talk about what's on  8 this document. This is the -- a confidential ITD  9 5-minute drill from November 6th, 2007.  10 What portion of the organization is this from,  11 sir?  12 A This is essentially the global organization  13 that -- this 5-minute drill would have been run by  14 Bob Zapfel, who was the general manager for Global  15 ITDelivery at the time.  16 Q And he was above Joanne Collins-Smee?  17 A He was, yes. He was Joanne's manager.  18 Q So this is his drill. Let's go down to the  19 first portion of this above the highlighted portion.  20 The first portion is on diversity. Why is that in  21 there, sir?  22 A The purpose of a 5-minute drill is to really  23 look at, talk about, and make decisions about an  24 executive team. So we would look at movement in and  25 out. We'd also look at the demographics, the makeup.</p>

<p style="text-align: right;">Page 1309</p> <p>1 And in this case, the portion you're pointing  2 to, the "Executive Diversity," we also paid attention  3 to that dimension of the team. We looked at  4 women-versus-men representation, the population of  5 women versus men, and we also looked at minority  6 executive representation.  7 Q Now, below that is a section called "Announced  8 Moves"?</p> <p>9 A Yes.  10 Q Would you tell the jury what is that?  11 A Well, that is a listing of those decisions  12 that had been approved in a prior 5-minute drill that  13 had been then announced and made official. It was  14 published online or through e-mails -- announced that  15 the person was in the job, and the person officially  16 moved in, assumed the responsibility, and started  17 working for the team.  18 Q Okay. And there are a bunch of names on that,  19 some of whom we've heard about. And under that is  20 another section called "Unannounced Moves."  21 And I wonder if you could tell the jury what  22 the "Unannounced Moves" are? What are those? You can  23 see Mr. Crawford's the first name there. Maybe you  24 could tell us what that's about.  25 A "Unannounced Moves" were decisions that had</p>	<p style="text-align: right;">Page 1311</p> <p>1 A Yes.  2 Q Then you've got a bunch of different people  3 here, and it goes on, on the next page. But let's  4 just look at this one. There are about how many? Ten  5 people on this list in pages 4 and 5, I think?  6 A Yes.  7 Q Let's just look -- what function does this  8 serve, the "Key People to Move" portions, in there?  9 A The "Key People to Move" portion of this drill  10 is intended to keep folks aware of people who are  11 available for a job, about to become available for a  12 job, and should be kept in mind when people are  13 looking to fill jobs. This is essentially the folks  14 who were on deck for a new assignment.  15 Q Okay. And Mr. Castelluccio's name is  16 highlighted, correct?  17 A Yes, that is correct.  18 Q And are there also -- there's also a column  19 entitled PBC Information?  20 A Yes.  21 Q And what's that?  22 A That is just a data point on what is the  23 person's current performance assessment, and it gives  24 the PBC assessment. In this case, it's a 2. And it  25 gives the date that that assessment was given, and</p>
<p style="text-align: right;">Page 1310</p> <p>1 been approved and agreed for the person to move into  2 the job, but it had not become official. There hadn't  3 been memos sent or announcements published online, and  4 the person was not actively, officially in the job  5 yet.  6 Q So in other words, just to use Mr. Crawford as  7 an example, the unannounced move, he's being -- is  8 it -- well, why don't you explain what that entry is?  9 Rather than having me explain it, why don't you  10 explain what that entry is?  11 A Yes. What this indicates is that  12 Gordon Crawford had been approved to take over as the  13 senior DPE for WellPoint, but that that move had not  14 been officially announced, and Gordon had not  15 officially moved to that job yet.  16 Q Why would that have been? Do you know?  17 A Yes. In this case, it was because Gordon was  18 still engaged in his prior job and wasn't available to  19 move. Everyone had agreed he was the guy, he was  20 going to take the job, but he simply couldn't come  21 from the U.K. where he was out of the job he was in  22 and assume this position yet.  23 Q Let's go down if we can to page 4 of this  24 document, please, and the section that's highlighted,  25 "Key People to Move."</p>	<p style="text-align: right;">Page 1312</p> <p>1 that was in December of 2006.  2 Q And this is November 2007?  3 A November 2007. So that would be if  4 Mr. Castelluccio -- actually all these executives'  5 current PBC of record at that time.  6 Q Okay. Now, this is Mr. Zapfel's drill. What  7 role did you play -- well, let's not go there quite  8 yet.  9 Did you prepare this? Would you prepare this  10 agenda for Mr. Zapfel's drills?  11 A No, I would not.  12 Q Who would?  13 A This would have been put together by my  14 manager, Steve Jarrett, and the executive resources  15 program manager who worked with Steve and me. That  16 would have been Molly Schleis, I think, at the time.  17 Q Now, we've heard about various levels of  18 drills. Ms. Collins-Smee had a drill, right?  19 A Um-hmm.  20 Q And what role would you have with regard to  21 her drills?  22 A Oh, with that drill, I would essentially  23 organize it and I would facilitate it. I would have  24 put together this -- a document similar to this for  25 Joanne's drill. I would have sent that out to the</p>

<p style="text-align: right;">Page 1313</p> <p>1 team before the drill started.</p> <p>2 I would have made notes of the discussion,</p> <p>3 which I would then send out to the team. And I would,</p> <p>4 sort of -- I would update it so that things that were</p> <p>5 agreed would either move to announce or unannounced in</p> <p>6 the next go around. And I essentially prepared for</p> <p>7 and ran the drill at Joanne Collins-Smee.</p> <p>8 Q We heard testimony about Pat Kerin's drill.</p> <p>9 Who is Pat Kerin?</p> <p>10 A Pat Kerin, at that time, was the general</p> <p>11 manager for GTS Americas.</p> <p>12 Q And GTS was?</p> <p>13 A Global Technology Services. Sorry.</p> <p>14 Q And is that the sales side?</p> <p>15 A Yes. His team was essentially the sales and</p> <p>16 relationship management side of Global Technology</p> <p>17 Services. ITDelivery was the delivery and execution</p> <p>18 side.</p> <p>19 Q Now, in her February 28th e-mail to you,</p> <p>20 Ms. Collins-Smee says, "I also need to get Jim on</p> <p>21 Pat Kerin's 5-minute drill. He would like to move</p> <p>22 into a" -- she says "into a PE or a C band DPE role."</p> <p>23 And that's to you.</p> <p>24 At the time that this e-mail was written, who</p> <p>25 was in charge of putting Mr. Kerin's drill together?</p>	<p style="text-align: right;">Page 1315</p> <p>1 same building. I might have actually asked them</p> <p>2 face-to-face.</p> <p>3 Q Now, Mr. Castelluccio was not placed on the</p> <p>4 Pat Kerin drill at that time, correct?</p> <p>5 A That's correct.</p> <p>6 Q Did you know that at the time?</p> <p>7 A I did not realize that. I didn't participate</p> <p>8 in that drill. I didn't see the drill.</p> <p>9 Q Do you have any idea why he wasn't placed on</p> <p>10 the drill?</p> <p>11 A No. I don't know why they decided not to do</p> <p>12 that.</p> <p>13 Q He was placed on the drill later --</p> <p>14 Pat Kerin's drill later in the year, I think, November</p> <p>15 or December. How did that come about?</p> <p>16 A That would have come about through a similar</p> <p>17 request. I would have reached out to them and said,</p> <p>18 Can you put Jim on the drill? Are you bringing in</p> <p>19 people from outside? And this time I was successful</p> <p>20 in getting him to include him.</p> <p>21 Q Now, I think he was -- Mr. Castelluccio was</p> <p>22 placed on the Zapfel drill -- Bob Zapfel's drill,</p> <p>23 which we see up there, back in June 2007. Did you</p> <p>24 have a role in that?</p> <p>25 A Yes. It was the same role. I would reach out</p>
<p style="text-align: right;">Page 1314</p> <p>1 A That would have been -- I believe that would</p> <p>2 have been Patricia Lewis at the time. She was the</p> <p>3 human resources vice president for Pat Kerin, and she</p> <p>4 would have worked with Greg Burnett, who was the</p> <p>5 executive resources person.</p> <p>6 Q How would you go about getting someone on</p> <p>7 Pat Kerin's drill?</p> <p>8 A Well, I would ask -- I would reach out to</p> <p>9 them. I would tell them, you know, what we wanted to</p> <p>10 add to their drill, and tell them why, and provide the</p> <p>11 information that they would need to put together the</p> <p>12 chart for the discussion material for whichever part</p> <p>13 of the drill it was, whether it was a specific job or</p> <p>14 a key person to discuss.</p> <p>15 Q Did you do so in this instance with regard to</p> <p>16 Mr. Castelluccio?</p> <p>17 A Yes. Yes, I did.</p> <p>18 Q What did you do?</p> <p>19 A I reached out to Patricia. I reached out to</p> <p>20 Greg and asked them if we could include Jim on the</p> <p>21 drill.</p> <p>22 Q And did you do that through a telephone</p> <p>23 conversation?</p> <p>24 A Yes. Yes. It would have been a phone</p> <p>25 conversation, or they were on the same floor in the</p>	<p style="text-align: right;">Page 1316</p> <p>1 to the folks who ran that drill and ask them to</p> <p>2 include Jim, provide the information, and they</p> <p>3 included him.</p> <p>4 Q Okay. And he was not placed on</p> <p>5 Ms. Collins-Smee's drill until January, as I recall,</p> <p>6 2008. Why was that?</p> <p>7 A That was a judgment. We didn't think it was</p> <p>8 appropriate to have Jim on a drill with folks who</p> <p>9 were, for the most part, his peers. Then as we got</p> <p>10 later into the process, we thought that it would be</p> <p>11 more to his benefit to include him. And so we took</p> <p>12 the step to include him as a key person and to include</p> <p>13 him in slates when we had openings.</p> <p>14 Q Now, let me ask if we can turn to Defendant's</p> <p>15 Exhibit 44, please.</p> <p>16 Do you recognize this document, sir</p> <p>17 A Yes, I do.</p> <p>18 Q And what is it?</p> <p>19 A It's an e-mail from Joanne Collins-Smee to me</p> <p>20 from March 2007. It's referring to a couple of</p> <p>21 topics -- couple of items she wanted to have included</p> <p>22 in the next Bob Zapfel 5-minute drill.</p> <p>23 Q And one of them is Mr. Echavarria?</p> <p>24 A Yes, that is correct.</p> <p>25 Q And why did she have to have Mr. Echavarria on</p>

Page 1317	Page 1319
<p>1 Mr. Zapfel's drill?</p> <p>2 A Because this was a vice president-level job,</p> <p>3 and those required Bob Zapfel's review and approval,</p> <p>4 and the 5-minute drill was the way to get that.</p> <p>5 Q Now, at the time this was happening at the end</p> <p>6 of March, this is before Mr. Morin resigns. Assuming</p> <p>7 no other immediate assignments were available for</p> <p>8 Mr. Castelluccio, what would have happened to him once</p> <p>9 a replacement came?</p> <p>10 A Once someone was named to the WellPoint</p> <p>11 account, he would have gone into a situation we refer</p> <p>12 to as being on the bench.</p> <p>13 Q I think you may have misspoken. Once he was</p> <p>14 replaced by Mr. Echavarria.</p> <p>15 A Oh, I'm sorry. Can you state the question</p> <p>16 again?</p> <p>17 Q Sure. We're talking about the same thing, I</p> <p>18 believe. If he was replaced in the vice president</p> <p>19 role and assuming nothing else was available, what</p> <p>20 happens to him?</p> <p>21 A Oh, okay. Yes. So the -- assuming -- in any</p> <p>22 situation where an executive has been taken out of a</p> <p>23 role and a replacement has been named, that executive</p> <p>24 is what we call "put on the bench." That means that</p> <p>25 they don't have a specific assignment, but they are</p>	<p>1 A There's a few things they could do. They</p> <p>2 could network. They could reach out to other</p> <p>3 executives who would be hiring managers for jobs for</p> <p>4 which they need a candidate. They could just on their</p> <p>5 own do research or keep track of executive movement to</p> <p>6 see what job might be opening or who in the network</p> <p>7 might be moving into a position where they could hire</p> <p>8 them. Or they could reach out to folks for updates on</p> <p>9 activity like 5-minute drills; what was discussed,</p> <p>10 what was available, where might they have opportunity.</p> <p>11 Q Would it be appropriate -- let me just give</p> <p>12 you an example. Would it be appropriate if someone</p> <p>13 knew Bob Zapfel -- everyone knew he was running a</p> <p>14 drill, right?</p> <p>15 A Right.</p> <p>16 Q Would it be appropriate to approach Mr. Zapfel</p> <p>17 and say, I'm without a role. What do you think? Can</p> <p>18 you help me?</p> <p>19 A Yes. That would be absolutely appropriate.</p> <p>20 Q How about Mr. Kerin? If you knew he was</p> <p>21 running a drill?</p> <p>22 A Yes.</p> <p>23 Q Nothing inappropriate about that, right?</p> <p>24 A No. People frequently do that.</p> <p>25 Q So does IBM's internal website have some form</p>
Page 1318	Page 1320
<p>1 still a member of the team and just in transition, but</p> <p>2 without a specific role.</p> <p>3 Q Have you ever heard the term, "Your career is</p> <p>4 your responsibility," at IBM?</p> <p>5 A Yes. I've heard that many times.</p> <p>6 Q Frequently?</p> <p>7 A Yes.</p> <p>8 Q So what does that term mean for an executive</p> <p>9 who's on the bench?</p> <p>10 A It means -- well, for everyone, it means that</p> <p>11 when you're in transition, whether it's by choice or</p> <p>12 something happens in the organization, it's your</p> <p>13 responsibility to make the effort to find your next</p> <p>14 job, to -- it also means that it's your responsibility</p> <p>15 to build a track record and a reputation and a network</p> <p>16 that's going to help you do that. That's the sort of</p> <p>17 bigger picture meaning of it.</p> <p>18 Q So it's on the record, when an executive is in</p> <p>19 transition, they continue to get paid their salary?</p> <p>20 A Yes, they continue to get paid their salary.</p> <p>21 Q And they're continued to be covered by IBM</p> <p>22 benefit plans?</p> <p>23 A Yes. There's no change to benefit plans.</p> <p>24 Q So how would an executive go about finding a</p> <p>25 position? What would they do?</p>	<p>1 of communication about executive movement?</p> <p>2 A Often. It's not universal, but executive</p> <p>3 appointments or announcements are often published on</p> <p>4 the IBM website. There -- these days in blogs or in</p> <p>5 web posts called "executive corners," the</p> <p>6 communications team just puts together a brief blurb</p> <p>7 and it's announced to folks at IBM.</p> <p>8 Q So if somebody saw that Gordon Crawford moved</p> <p>9 from here to there, would that -- could that provide</p> <p>10 information for an executive looking for a position?</p> <p>11 A Yes, it could. Absolutely. And I know many</p> <p>12 situations where something gets announced and the</p> <p>13 e-mails and phone calls start pretty quickly.</p> <p>14 Q Well, what kinds of e-mails, and why would</p> <p>15 they start? Why don't you tell the jury how that</p> <p>16 happens?</p> <p>17 A Because people would be interested in moving</p> <p>18 into that job. When a new executive is announced,</p> <p>19 sometimes people reach out to that executive and</p> <p>20 congratulate him or her. And then the other piece of</p> <p>21 the e-mail will be, so does your boss have anybody in</p> <p>22 mind for your backfill?</p> <p>23 Or people who knew I was the HR leader for an</p> <p>24 organization that had had an executive move might</p> <p>25 actually contact me, particularly if they knew me, to</p>



<p style="text-align: right;">Page 1321</p> <p>1 see if I had any suggestions or insight about whether 2 they could apply or whether they could be considered. 3 Q I want to switch gears and talk about 4 something else, and that is what might happen if an 5 executive who was having trouble finding a position 6 chose to look at a non-executive position? Are you 7 familiar with that happening? 8 A Yes. 9 Q So generally, how would that work? 10 A Well, anyone who wants to apply for a 11 non-executive job can go online to see which jobs are 12 available. There's a web job board called "The Global 13 Opportunity Marketplace," which is -- I guess it's 14 IBM's version of monster.com or some other job board. 15 You can go in, and you can search for a job by 16 band, by title, by skill, or even by hiring manager to 17 see what's available. And then you could either apply 18 to the manager offline, call the manager, or you could 19 apply for the job directly online. 20 Q So you could search for Band 10 New York 21 delivery, right? 22 A Yes, you could. You could put in that set of 23 criteria, and it would pull a list of jobs. 24 Q And these are all -- these are publicly 25 posted -- within IBM, not publicly, I mean.</p>	<p style="text-align: right;">Page 1323</p> <p>1 Q -- of the job? That's what I was trying to 2 ask you. 3 A Yes. So for a Band 10 delivery project 4 executive, there would be one salary range. For a 5 Band 10 human resources person, there would be a 6 different salary range. For a Band 10 marketing 7 person, there would be yet another salary. 8 Q Could a Band 10 position have significant 9 responsibilities? 10 A Yes. Definitely. There are Band 10 jobs -- 11 if you look across IBM, Band 10 in certain parts of 12 the world could be a country manager. Somebody in 13 Eastern Europe -- some Eastern European country may, 14 in fact, be managed by a Band 10. 15 Q Are Band 10 employees eligible for bonuses? 16 A Yes. 17 Q Do they continue to receive their IBM 18 benefits? 19 A Yes. 20 Q And does IBM have a policy that governs 21 compensation when an executive -- an A, B, C, or D 22 executive moves into a numerically banded job? Is 23 there a policy on that? 24 A IBM has a policy that applies to any movement 25 from a higher to a lower band, including executives</p>
<p style="text-align: right;">Page 1322</p> <p>1 A Yes. 2 Q I can't get them, right? 3 A Anyone with an IBM online ID and a password 4 could go in and check. 5 Q And I think we've established -- but band -- 6 non-executive jobs are banded from 1 to 10? 7 A That's correct, yes. 8 Q And 10 being the highest? 9 A Yes. 10 Q And is there a salary range within these 11 various bands? How does that work? How are the 12 salaries set? 13 A Actually a band is, in fact, associated with a 14 salary range. A band is a salary band, and there's a 15 range of salaries, or minimum and a maximum, for each 16 job group, each band at IBM. 17 Q And so this would be sorted by job and band. 18 Is that what you're saying? 19 A The jobs -- in the jobs that were posted, yes. 20 You could -- you wouldn't sort it by salary; it would 21 be sorted by band. 22 Q No. I think I'm asking -- I may not have been 23 clear. So there would be -- on a Band 10 job, there 24 might be varying salaries based upon the nature -- 25 A Oh, yes.</p>	<p style="text-align: right;">Page 1324</p> <p>1 moving into non-executive roles. 2 Q Tell the jury what that policy is, please. 3 A Well, that policy is that the adjustment, the 4 reduction in their salary, can be no more than 5 10 percent of the salary. But what we try to do 6 generally is keep someone's salary within the range 7 for that job, but sometimes someone in a higher band 8 will have a higher salary. 9 So just a simple example, if someone was in a 10 job that paid \$120,000, they moved into a job where 11 the maximum was 100,000, the biggest reduction to 12 their salary would be 12,000, which is the 10 percent 13 limit. So someone could be in a job where a maximum 14 is a hundred, but they would make 108 simply because 15 of this policy of not reducing salary by more than 16 10 percent. 17 Q And could they move -- make that move without 18 suffering a reduction in salary? 19 A They could because of the broad ranges for 20 salaries. You could have someone at a higher band 21 whose salary would fit into the range for a lower 22 band. 23 Q And could someone who was bidding down into a 24 Band 10 bid back up or somehow get up back into the 25 executive ranks at some point?</p>



<p style="text-align: right;">Page 1325</p> <p>1 A Yes. If that person were still viewed as 2 having the skills and the experience to be an 3 executive, they could remain in the pool of talent 4 from which we hired executives. It's called "The 5 Executive Resources Program." And that would keep 6 them in the database. They could be pulled into a 7 slate. They could be interviewed for a job, and if 8 they were right -- the right candidate, they could, in 9 fact, return to an executive job.</p> <p>10 Q You seem to know a lot about this process. 11 Did you go through this process?</p> <p>12 A Yes. I personally went through a job change 13 that involved me going from an executive job, when I 14 was the director of human resources for ITDelivery, 15 into a non-executive job through restructuring.</p> <p>16 Q And so tell the jury how you went about that, 17 and what happened.</p> <p>18 A Well, I was informed that the job I was in was 19 being eliminated, and I was given the choice of 20 finding another job within IBM or accepting a 21 separation package. I chose to network with folks 22 that I knew, identify a job -- a Band 10 job, with a 23 colleague who knew my skills and thought I was good 24 for the job.</p> <p>25 And she offered me the job after going through</p>	<p style="text-align: right;">Page 1327</p> <p>1 A It is a series of e-mails between 2 Joanne Collins-Smee, Dave Liederbach, and 3 Jim Castelluccio.</p> <p>4 Q Were you aware at about this time that 5 Mr. Castelluccio was being moved to WellPoint?</p> <p>6 A Yes. I was aware that that was the plan.</p> <p>7 Q How did you become aware?</p> <p>8 A Through conversations with Joanne.</p> <p>9 Q Did you discuss it with her once, more than 10 once?</p> <p>11 A Probably multiple times.</p> <p>12 Q In person? On the telephone?</p> <p>13 A A combination. But I do recall we had a 14 number of face-to-face conversations, because again, 15 this was a member of her senior team, an important 16 change we were going through. So we would have been 17 in contact.</p> <p>18 Q Did you have an understanding of the rationale 19 for this move?</p> <p>20 A As I understood it, because of the change in 21 the vice president of public sector, Jim was 22 available. And there was a need for a senior DPE -- 23 executive DPE on WellPoint. And it was an available 24 person and an open opportunity, and it was just a 25 match. That was my understanding.</p>
<p style="text-align: right;">Page 1326</p> <p>1 the process that was -- that we saw with the 5-minute 2 drill since human resources jobs, even non-executive 3 jobs, go through a 5-minute drill. I was taken in as 4 the lead candidate. The team agreed it was a good 5 fit, it made sense, and I was offered the job and 6 moved into it. And I've been in that role in some 7 form for the last several years.</p> <p>8 Q And are you a Band 10?</p> <p>9 A Yes, I am.</p> <p>10 Q What happened to your salary when you made the 11 move? Did you suffer a reduction in salary?</p> <p>12 A Nothing. My salary at that time as a Band D 13 was within the range for a Band 10. So there was no 14 adjustment.</p> <p>15 Q So let's switch to another topic. I think we 16 established that Mr. Morin, who we heard from on the 17 stand, resigned at the end of March 2007. And I think 18 we were talking about his backfill.</p> <p>19 MR. FASMAN: Can we put up number 45, 20 Jean?</p> <p>21 BY MR. FASMAN:</p> <p>22 Q Have you had a chance to look at that, 23 Mr. Holmes?</p> <p>24 A Yes, I have.</p> <p>25 Q What is it?</p>	<p style="text-align: right;">Page 1328</p> <p>1 Q What was your understanding, if you had one, 2 as to whether this was temporary or permanent?</p> <p>3 A My understanding was it was temporary and 4 could become permanent. It was -- again, my 5 understanding was that Jim would be assigned, and if 6 he could perform and deliver in the role, he would 7 essentially be able to earn it as a permanent 8 assignment.</p> <p>9 Q Did you consider this move some kind of 10 punishment?</p> <p>11 A No. I considered this move as an opportunity.</p> <p>12 Q Now, I think we've established previously that 13 Mr. Castelluccio was ultimately replaced by 14 Gordon Crawford.</p> <p>15 As much as I would love to go through every 16 one of the 5-minute drills that he was on, I'm not 17 going to do that. But they are the following 18 exhibits, and I'd like to just read them so that we 19 have them, the jurors will have them in their 20 notebooks when we're done. I think that's what we 21 agreed. So these are Exhibits 58, 60, 67, 72, 70 -- 22 these are all Defendant's Exhibits -- 78, 81, 83, 84, 23 90, 93, 97, 98, 101, 103, and 119.</p> <p>24 And those are right, correct?</p> <p>25 So, Mr. Holmes, did you attend 5-minute</p>

<p style="text-align: right;">Page 1329</p> <p>1 drills -- I think you've talked a little bit about  2 this -- did you attend 5-minute drills as part of your  3 job?  4 A Yes, I did. I attended a couple of different  5 5-minute drills.  6 Q Tell the jury what 5-minute drills you  7 attended and what your role was in these various  8 drills.  9 I mean, you've explained what you did in Ms.  10 Collins-Smee's drill, right?  11 A Yes.  12 Q You ran that one?  13 A Yes. I organized and facilitated and led that  14 drill discussion. I also attended the 5-minute drill  15 that was run by Bob Zapfel. Those were the two  16 levels -- the -- leaders change over time -- but those  17 were the ones where I was actively, consistently  18 involved.  19 Q Were those drills that Ms. Collins-Smee  20 attended as well?  21 A Yes. The ITD America drill was her drill, and  22 she was there almost all the time. There might have  23 been one occasion where she wasn't present, and we  24 proceeded. And she was also a participant in the  25 Bob Zapfel drill as one of his direct reports. And</p>	<p style="text-align: right;">Page 1331</p> <p>1 relating to Jim and opportunity.  2 Q And how about on various other -- strike that.  3 What would she say about him?  4 A It varied. I mean, if it was -- early on, it  5 was to make it -- you know, to inform folks that he  6 was available to -- you know, to promote him to people  7 as someone they should look at.  8 In different discussions, as we went through  9 to look at specific jobs, there were occasions where  10 she would suggest he be added to a list for  11 consideration or when it was part of the discussion as  12 we moved through time, because there were a number of  13 drills.  14 Sometimes it would just be to answer questions  15 that people might have had about Jim and his  16 availability and what he was interested in -- just to  17 provide an update. But it ranged from answering  18 questions through active promotion of him as a  19 candidate.  20 Q Do you recall her saying anything that would  21 have made it more difficult for him to get a job?  22 A No, I do not.  23 Q When you say "active promotion," what types of  24 things would she say?  25 A She would say, I really think you could</p>
<p style="text-align: right;">Page 1330</p> <p>1 she was always invited and usually attended and  2 actively engaged.  3 Q Just to clarify, the ITD America's drill, Ms.  4 Collins-Smee's drill, that was held every month?  5 A Yes. It was standard to hold it monthly.  6 There may have been months where because of scheduling  7 it was cancelled, or because there was no new activity  8 we might have skipped it. But it was a standard  9 monthly meeting.  10 Q Now, let's talk about the Zapfel drills. Did  11 you and she attend those meetings together?  12 A Sometimes. If we were both in Somers on the  13 day at the time of the drill, we might attend together  14 or we might dial in and take the call together.  15 Q Now, do you recall -- on the Zapfel drill, do  16 you recall Ms. Collins-Smee bringing Mr. Castelluccio  17 up at any time?  18 A Yes. He was -- since he was often shown in  19 those drills as a key person to discuss, when we got  20 to that portion of the conversation, they would look  21 to Joanne since she was -- I believe from experience  22 and what I saw here, she was always listed as the  23 executive sponsor. So as we got to that part of the  24 discussion, the team would look to Joanne for any  25 updates or if they had questions or if they had ideas</p>	<p style="text-align: right;">Page 1332</p> <p>1 consider Jim for this job, because of X, Y, Z. She  2 would talk about his experience. She would talk about  3 his skill sets. She would talk about the job. And  4 based on her knowledge of the job, the client, Jim,  5 all the factors, she would try to make the case that  6 he should be considered, at least.  7 Q How many -- just generally speaking, how many  8 times do you recall her doing that; that is,  9 recommending him for a position whether he was on the  10 slate or not?  11 A More than a couple, less than a dozen. Again,  12 it was multiple drills and many jobs. I can't --  13 Q Okay. Is it possible for a candidate to be on  14 too many drills?  15 A Yeah. It is, in my experience.  16 Q And why don't you tell the jury why you say  17 that?  18 A Well, sometimes if a person -- because again,  19 these are regular discussions with the same audience.  20 And if somebody comes into a drill often, folks might  21 start to just sort of ignore it or stop paying  22 attention. They might stop asking questions. They  23 might -- you know, my own point of view, my own sort  24 of reading of people is they just get tired of it.  25 And sometimes people just decide -- will</p>

<p style="text-align: right;">Page 1333</p> <p>1 decide tactically to put someone -- you know, if  2 you're brought in as a key person to discuss and  3 you're on the slate, but you don't get the job,  4 they'll just pull that person off of a drill for a  5 while to let folks, I guess, clear their pallet, clean  6 their pallet on it, because, you know, again, you  7 don't want them to turn off to the person as a  8 candidate.  9 Q All right. Now, let's go to another subject,  10 and that is Mr. Castelluccio's termination. At some  11 point, a decision was reached as to -- that  12 Mr. Castelluccio's time on the bench would have to  13 end. Who made that decision?  14 A Joanne Collins-Smee made that decision.  15 Q Had you discussed that issue with her before  16 she made that decision?  17 A Yes. Over the course of months before that,  18 we had talked about it in a number of conversations, a  19 couple of different contexts.  20 Q Can you tell the jury what the nature of those  21 discussions was?  22 A Well, as we went through different  23 assignments -- or as Jim went through different  24 assignments, as we went through different efforts and  25 5-minute drills and reaching out to people about</p>	<p style="text-align: right;">Page 1335</p> <p>1 A Yes, I do.  2 Q What is it?  3 A It is an e-mail that I sent to  4 Joanne Collins-Smee with some talking points and some  5 information about documents that would need to be  6 shared with Jim as part of a discussion about his  7 being offered a separation package if he couldn't find  8 a new role by the end of June 2008.  9 Q Now, it appears there was a separation package  10 attached to this, sir?  11 A Yes.  12 Q Are you familiar with the separation packet?  13 A Yes, I am.  14 Q And did it contain a general release of  15 claims? I think we heard that already.  16 A Yes.  17 Q And in connection with a general release of  18 claims, does it also advise the employee to consult a  19 lawyer?  20 A Yes, it does.  21 Q Do you know why that's the case?  22 A I understand that's because of EEO regulations.  23 Q And did this package include that portion?  24 A Yes, it did.  25 Q I wonder if we could turn, then, to the next</p>
<p style="text-align: right;">Page 1334</p> <p>1 opportunities for Jim and weren't getting results, we  2 had the conversation about what was reasonable. How  3 long could we afford to stay in this mode of having a  4 VP level executive on the bench; afford in terms of  5 just their salary and the expense, but also afford in  6 terms of, you know, appearances and impact on the rest  7 of the team; what was reasonable? And we had a couple  8 different conversations, had -- maybe had a few  9 different opinions on it over time. But it did come  10 to a point where we agreed that we couldn't stay in  11 the mode and had to make a decision.  12 Q So ultimately, she decided six months on the  13 bench was enough. Did you think that was  14 unreasonable?  15 A I did not think that was unreasonable.  16 Q What did you think of it?  17 A Actually, I thought it was generous.  18 Q And why?  19 A Because in my experience that -- for someone  20 to be on the bench without a clear assignment for six  21 months was unusual. It was more typically half that  22 time.  23 Q Okay. Let me ask you to turn to Defendant's  24 Exhibit 117, please.  25 Do you recognize this document, sir?</p>	<p style="text-align: right;">Page 1336</p> <p>1 exhibit, which is Defendant's Exhibit 118, please.  2 And what is this document, sir?  3 A This is an e-mail that I sent to  4 Jim Castelluccio, copying Joanne Collins-Smee, which  5 contained copies of -- soft copies of the documents  6 associated with his offer of a separation package. I  7 sent this as a follow-up to Joanne's meeting with Jim  8 to make sure he had the documents and to let him know  9 that he should review them and that I would be  10 available to answer any questions that he had on them.  11 Q Now, these -- are you familiar with these --  12 what the documents referenced here?  13 A Yes, I am.  14 Q Are any of them a noncompetition agreement?  15 A No, they aren't.  16 Q Would any of them be a barrier to  17 Mr. Castelluccio calling prior contacts that he met at  18 IBM and seeking work?  19 A No, they would not.  20 Q Did you have a discussion with  21 Mr. Castelluccio about these documents?  22 A Yes, I did. We met probably a few days after  23 I sent this e-mail.  24 Q And what was the nature of that discussion?  25 A Well, that was a discussion -- there were a</p>

<p style="text-align: right;">Page 1337</p> <p>1 couple parts to it -- three actually. One was just to  2 check in with Jim, following up the conversation with  3 Joanne, and we talked about his situation and what  4 that meant. And then we went through the documents  5 themselves, particularly the executive separation  6 agreement, and we talked through it, walked through  7 it, shared a couple of questions.  8 I agreed that -- I either answered the  9 questions where I knew it, or I agreed to follow up  10 and get him answers about the document itself. And  11 then we just closed the meeting talking about --  12 again, telling him to reach out to me if he had  13 questions and confirming the timeline for him to make  14 a decision, and/or, you know, you can find a job, make  15 a decision.  16 Q Did he say anything about Mr. Liederbach in  17 this discussion with you?  18 A That was part of the -- yeah, part of the sort  19 of discussion about the situation. When I met with  20 Jim, he shared with me that he thought some of this  21 was -- a lot of this was tied to the fact that he and  22 Dave Liederbach hadn't seen eye to eye or just had  23 different personalities and it hadn't worked out. And  24 that was a reference to Dave Liederbach in that  25 conversation.</p>	<p style="text-align: right;">Page 1339</p> <p>1 refresh on how something is done.  2 A policy document would be a mandatory  3 document stating a specific approach and requirement  4 for managers to follow. This is guidance and advice,  5 which is different, I think.  6 Q So who are -- do you recognize the name -- the  7 highlighted portion, who are these people who put it  8 together?  9 A I recognize several of the names. They are  10 human resources generalists. There are a couple of  11 folks who are involved in the employee relations  12 part -- organization within human resources. And  13 there's actually a couple of folks from other  14 disciplines there. There's a member of the legal  15 team, but these are HR people, lawyers who essentially  16 did this apparently as a project.  17 Q So let's turn to page 3, if you would, please,  18 because we've heard about this document previously.  19 Turn to page 3, and the top highlighted portion says:  20 "What are general guidelines for providing feedback,"  21 right?  22 A Yes.  23 Q And what's your understanding of general  24 guidelines for providing the feedback?  25 A General guidelines for providing feedback are</p>
<p style="text-align: right;">Page 1338</p> <p>1 Q I have just a couple more questions on various  2 different exhibits.  3 Can we turn to Plaintiff's Number 65, please?  4 MR. FASMAN: This is our copy, if it's  5 okay.  6 THE COURT: Yes.  7 BY MR. FASMAN:  8 Q Aside from the page that I just tore, it has  9 no notes or other markings on it.  10 Mr. Holmes, do you know what that is?  11 A Yes. This is what's referred to as a quick  12 view --  13 Q What's that?  14 A -- document.  15 It's a training information piece that's put  16 together for managers on different topics, to share  17 best practices, tell them tips and tricks and pitfalls  18 in doing different things in managing their people.  19 Q Is this a policy guidance document?  20 A No, this is not.  21 Q How does it differ from that?  22 A What this is -- again, this is a manager  23 guide. It's primarily intended for new managers who  24 want to understand how-tos and for experienced  25 managers who want to keep up on current practices or</p>	<p style="text-align: right;">Page 1340</p> <p>1 recommended approaches to delivering feedback to  2 employees.  3 Q So let me direct your attention, like, to the  4 third bullet down, "Establish the right environment."  5 Is it mandatory that a manager must establish  6 the right environment for providing feedback?  7 A It's not mandatory; it's recommended.  8 Q How about the next one? "Giving feedback with  9 care and attention"?  10 A Again, not mandatory, not always done, but  11 highly advised.  12 Q And how about -- I don't know -- take the next  13 one down: "Listen to and engage the employee"?  14 A Again, this is -- this would be the best  15 practice. This would be what good managers do if they  16 want to do everything right, but it's not mandatory.  17 Q And how about the next page? The portion that  18 we've heard about before, top of page 4, "Maintain  19 notes"?  20 A No, again, that's -- no, that's not mandatory.  21 It is good practice, particularly for managers with a  22 lot of people who have a lot going on, but it's not  23 mandatory.  24 Q And if the manager didn't do that, would that  25 prove that they're engaged in age discrimination?</p>

<p style="text-align: right;">Page 1341</p> <p>1 A I don't think so.</p> <p>2 Q Let me ask you if you would, please -- I'll</p> <p>3 take that back and I'll give you another one. And</p> <p>4 this is Plaintiff's 204. Let me ask you, Mr. Holmes,</p> <p>5 this is another one we have previously seen. This is</p> <p>6 a document that Mr. Carta examined on, and if I could</p> <p>7 ask you to please turn to page 7 of this document.</p> <p>8 That's the highlighted portion.</p> <p>9 Do you see that, sir?</p> <p>10 A Yes, I do.</p> <p>11 Q Now, I believe Mr. Carta had one of his</p> <p>12 witnesses read just the first highlighted sentence.</p> <p>13 Why don't you read them together into the record,</p> <p>14 please?</p> <p>15 A "Plaintiff was separated from IBM for</p> <p>16 legitimate non-discriminatory business reasons, his</p> <p>17 poor performance in two assignments in the Integrated</p> <p>18 Technology Delivery organization. Even after being</p> <p>19 removed from his last role, IBM still provided him</p> <p>20 more than six months at full pay to obtain another</p> <p>21 position within the Company, and assisted him in doing</p> <p>22 so, before he was ultimately separated in June 2008."</p> <p>23 Q So are those two reasons related in some way?</p> <p>24 A I'm sorry?</p> <p>25 Q Performance and not finding a job, are they</p>	<p style="text-align: right;">Page 1343</p> <p>1 A Yes, I have.</p> <p>2 Q And to the best of your knowledge, based on</p> <p>3 your review of records, is this also accurate, sir?</p> <p>4 A Yes.</p> <p>5 Q And maybe you can explain to the jury what</p> <p>6 this shows, sir?</p> <p>7 A What this shows is a comparison of the average</p> <p>8 ages for executive -- that's Band C vice president</p> <p>9 level executives and Band D director level executives.</p> <p>10 And it just looks at that movement over time. And</p> <p>11 essentially what you see is that both those</p> <p>12 populations have average ages throughout the period</p> <p>13 from 2007 to 2011 ranging from the early 50s through</p> <p>14 the early 60s.</p> <p>15 Q One more thing I'd like to ask you about, and</p> <p>16 that is Plaintiff's Exhibit Number 173.</p> <p>17 Mr. Holmes, do you know what that is?</p> <p>18 A Yes. It's an executive compensation</p> <p>19 statement.</p> <p>20 MR. FASMAN: I think this one was</p> <p>21 introduced earlier, Your Honor. It was to show that</p> <p>22 Mr. Castelluccio had received 174 shares of stock in</p> <p>23 2007 -- or stock options in 2007.</p> <p>24 BY MR. FASMAN:</p> <p>25 Q There's a reference on here -- and did you</p>
<p style="text-align: right;">Page 1342</p> <p>1 related in Mr. Castelluccio's case?</p> <p>2 A Indirectly.</p> <p>3 Q What do you mean by that?</p> <p>4 A In that as I said earlier, part of finding a</p> <p>5 job is a track record and a reputation. And if you</p> <p>6 are not performing in the role that you have, it is</p> <p>7 more difficult to find another job.</p> <p>8 Q Are these two statements both true, to the</p> <p>9 best of your knowledge?</p> <p>10 A Yes. To the best of my -- yes, they are.</p> <p>11 Q Two more issues I'd like to take up with you.</p> <p>12 One, at my request, IBM prepared a list of</p> <p>13 Ms. Collins-Smee's Band C and Band D executive reports</p> <p>14 during, I think it's 2008 to 2011. And I forwarded</p> <p>15 that to you, sir, did I not?</p> <p>16 A Yes, you did.</p> <p>17 Q And did you have a chance to review it?</p> <p>18 A Yes, I did.</p> <p>19 Q And to the best of your knowledge, is it true</p> <p>20 and accurate?</p> <p>21 A Yes, it is.</p> <p>22 MR. FASMAN: Can we put the demonstrative</p> <p>23 up from the chart, please?</p> <p>24 BY MR. FASMAN:</p> <p>25 Q Have you reviewed this chart as well, sir?</p>	<p style="text-align: right;">Page 1344</p> <p>1 review this at my request?</p> <p>2 A Yes, I did.</p> <p>3 Q And there's a reference on here. On page 2,</p> <p>4 is it? In fact, there's several of them. "Buy-First</p> <p>5 Stock Options." Do you see that?</p> <p>6 A Yes, I do.</p> <p>7 Q What's the nature of that program, sir?</p> <p>8 A Buy-First is a program that allows executives</p> <p>9 to buy IBM stock options by electing -- well, by</p> <p>10 investing a part of their bonus. They have the option</p> <p>11 to invest 5, 10, or 15 percent of their annual bonus</p> <p>12 in IBM options.</p> <p>13 Q So this would be a voluntary choice by the</p> <p>14 employee?</p> <p>15 A Yes. The employee would have to elect to make</p> <p>16 this investment.</p> <p>17 Q And this does not represent a normal grant of</p> <p>18 stock options to the employee for excellent</p> <p>19 performance, right?</p> <p>20 A Right. This would not be part of what -- this</p> <p>21 would not be part of the compensation cycle or award</p> <p>22 cycle.</p> <p>23 MR. FASMAN: The only other thing I would</p> <p>24 add -- I'm about to tender the witness, but I believe</p> <p>25 that when Mr. Castelluccio was testifying, Your Honor,</p>



<p style="text-align: right;">Page 1345</p> <p>1 I misspoke. And I thought these shares were for a  2 vacation buyback, and that is not right. That is what  3 I thought at the time, but I knew it wasn't a grant.  4 But this explains what they were. So I apologize, and  5 I apologize to the jury if I said something that was  6 misleading.  7 THE COURT: Thank you.  8 MR. FASMAN: I'm done with Mr. Holmes for  9 the moment.  10 THE COURT: Okay. Mr. Carta?  11  12 CROSS-EXAMINATION BY MR. CARTA:  13  14 Q Good afternoon, Mr. Holmes.  15 A Good afternoon.  16 Q I think you know that I'm Mark Carta, and I  17 represent Mr. Castelluccio.  18 A Yes.  19 Q You recall that I deposed you some time ago?  20 A Yes.  21 Q Let me start off with a question about the  22 executive movement being posted on the website.  23 Do you know when they first began posting  24 executive movement on the website?  25 A I don't know when they first began. I believe</p>	<p style="text-align: right;">Page 1347</p> <p>1 level executive, down to a Band 10? Wouldn't you  2 agree with that?  3 A I'm sorry. Did you say "B"?  4 Q I'm sorry. A Band C. I misspoke. A Band C  5 through a Band D all the way down to a Band 10.  6 Those are different situations entirely,  7 wouldn't you agree?  8 A Yes, I would agree. That is a different  9 situation.  10 Q Entirely different, do you agree with that?  11 A No. It's an executive going to a  12 non-executive job. So there is a similarity. It's a  13 very different circumstance personally.  14 Q Wouldn't you agree that's an extraordinary  15 situation for an executive to move from a Band C  16 position all the way down to a Band 10 position?  17 A Yes, I would agree with that. It would be  18 extraordinary.  19 Q It would be extraordinary. And, in fact, did  20 you and Ms. Collins-Smee ever discuss whether that was  21 something -- question withdrawn.  22 Let me just put some of this in context. You  23 were the HR executive for the ITDelivery department, I  24 think you said, starting in October of 2006?  25 A Yes, that's correct.</p>
<p style="text-align: right;">Page 1346</p> <p>1 it's been a practice as long as I've been at IBM.  2 Q Isn't it true that that practice that you've  3 discussed about executive information being available  4 on the website, that that practice was not in place in  5 2007?  6 A No, that's not true.  7 Q And was it -- is it your testimony that it was  8 in place also in 2008?  9 A Yes.  10 Q Okay. Let me ask you some questions about  11 what you maintain that you did. You maintain that at  12 one point you were out of a position and that you  13 agreed to step from -- what was your band at that  14 point? You were a step --  15 A It was a Band D.  16 Q You were in a Band D?  17 A Yes.  18 Q And you accepted a position in a Band 10 --  19 A Yes.  20 Q -- is that right?  21 Okay. Was that something that you had seen  22 commonly done before?  23 A Yes.  24 Q And that's different, would you agree, than  25 stepping from a Band B position, which is a second</p>	<p style="text-align: right;">Page 1348</p> <p>1 Q And at that point in time, Mr. Kelton Jones  2 was the head of ITDelivery?  3 A Yes. He was the general manager for  4 ITDelivery Americas.  5 Q And so for that first six-month period until  6 he was replaced by Collins-Smee, you were working for  7 Mr. Jones, is that right?  8 A Yes, that's right.  9 Q And in that time period, did you see  10 Mr. Kelton Jones ever put anybody on the bench?  11 A I don't recall.  12 Q And do you recall -- or were you with him long  13 enough to testify -- that it was his practice, if he  14 was going to move an executive out of a position, to  15 do that in parallel with backfilling that position so  16 that the position -- the executive he was pulling out  17 of a position would move directly into a new position?  18 Did you observe that that's how he performed when he  19 moved executives from one position to another?  20 MR. FASMAN: Your Honor, I just have to  21 object to the form of the question. It seemed like at  22 least two, and both of them were somewhat lengthy.  23 THE COURT: The objection's noted, but  24 it's overruled. I think the witness is following the  25 question. You can answer that, sir.</p>



<p style="text-align: right;">Page 1349</p> <p>1 THE WITNESS: I don't recall, honestly.  2 It's -- I don't know whether that was how Kelton  3 executed. I hadn't thought back to his approach to  4 moving executives for the four months that I worked  5 for him.  6 BY MR. CARTA:  7 Q Do you recall any instance in which he pulled  8 someone out of a position before he had a -- question  9 withdrawn.  10 Do you recall any situation where he pulled an  11 executive out of a position without having a position  12 for that executive to move into?  13 A No. I don't recall anything like that.  14 Q Okay. So after working with Mr. Jones for a  15 period of time, you then ran the 5-minute drills for  16 Ms. Collins-Smee, is that right?  17 A Yes.  18 Q And were the procedures for running the  19 5-minute drills essentially consistent between the way  20 they were run by Mr. Jones and the way they were run  21 by Ms. Collins-Smee?  22 A Yes. Essentially.  23 Q And in both instances, Mr. Jones and  24 Ms. Collins-Smee had the ability to have people added  25 to the slates if they chose to, isn't that right?</p>	<p style="text-align: right;">Page 1351</p> <p>1 kind of -- question withdrawn.  2 Those are the positions that Mr. Castelluccio  3 had performed in for the prior ten years, isn't that  4 correct?  5 A It would have been in the same organization,  6 though. The jobs had evolved over ten years. But  7 yes, that is correct.  8 Q So the positions that were discussed and  9 reviewed on the executive 5-minute drill run by  10 Ms. Collins-Smee, those are the very positions for  11 which Mr. Castelluccio was most qualified, isn't that  12 true?  13 A That's an opinion. I wouldn't agree with it,  14 though.  15 Q Were there other positions that -- let me  16 rephrase it.  17 The positions on Ms. Collins-Smee's 5-minute  18 drill, those were exactly the same positions as  19 Mr. Castelluccio's skill set -- were consistent with  20 Mr. Castelluccio's skill set, isn't that correct?  21 A Were the same or consistent? You asked two  22 questions.  23 Q Okay. I'll be more clear.  24 Isn't it true that positions that were  25 reviewed and discussed on Ms. Collins-Smee's 5-minute</p>
<p style="text-align: right;">Page 1350</p> <p>1 A In their 5-minute drills?  2 Q In their 5-minute drills.  3 A Yes.  4 Q That was entirely up to them, isn't that  5 correct?  6 A Yes.  7 Q If somebody else asked for somebody to be  8 added to a 5-minute drill and they didn't want that  9 person added, they could not have that person added on  10 their 5-minute drill, isn't that right?  11 A Yes, that's right.  12 Q And if they wanted to have somebody on a  13 slate, they could have that person on as many slates  14 as they wanted to, couldn't they?  15 A Yes, they could.  16 Q Now, just to recap, the positions that were  17 being filled on the ITD Americas drill, those were  18 positions for people in the ITDelivery outsourcing  19 business, isn't that correct?  20 A Yes.  21 Q That was the nature of the business. That was  22 the nature of the positions that were being filled on  23 that drill.  24 A Right. That was the scope of the drill.  25 Q And that was exactly the same scope as the</p>	<p style="text-align: right;">Page 1352</p> <p>1 drill, that those were the positions for which  2 Mr. Castelluccio had the best -- was best suited in  3 terms of his skills?  4 A That's -- again, it's an opinion. There were  5 other jobs in other parts of the business for which he  6 might have also been suited because of his experience  7 and his band level and the timing and the  8 organization. And the purpose of the 5-minute drill  9 is to put the best person into a job. So that's --  10 again, that's an opinion.  11 Q I'm asking you your opinion. Isn't it true --  12 I'm not asking you if there were other positions that  13 were available outside that 5-minute drill. I'm not  14 asking that. That's what you said, but that's not  15 what I'm asking.  16 I'm asking simply isn't it true that the  17 position -- you're familiar with the positions that  18 were being discussed on Ms. Collins-Smee's 5-minute  19 drill, right?  20 A Yes.  21 Q You created the drill, right?  22 A Yes.  23 Q And you would create the slate of candidates,  24 as she asked you to, isn't that right?  25 A Yes.</p>

<p style="text-align: right;">Page 1353</p> <p>1 Q So you're specifically familiar with the kinds 2 of positions that were there, isn't that right? 3 A That is right. 4 Q And those are the kinds of positions that 5 Mr. Castelluccio had the skills and background to 6 perform, isn't that correct? 7 A That is correct, yes. 8 Q And do you recall that Miguel Echavarria 9 replaced Mr. Castelluccio as VP of public sector? 10 A Yes, I do recall that. 11 Q And he assumed that position in June of 2007, 12 is that correct? 13 A Yes, that is correct. 14 Q So am I correct that, prior to the time that 15 Mr. Echavarria became VP of public sector, that 16 position was filled by Mr. Castelluccio? 17 A Yes, that is correct. 18 Q And do you recall that in his role as VP of 19 public sector, Mr. Castelluccio had participated in 20 the 5-minute drill process when he was in that role? 21 When he was one of the VPs for Ms. Collins-Smee, he 22 participated in the 5-minute drill process, isn't that 23 right? 24 A Right. 25 Q All the VPs did.</p>	<p style="text-align: right;">Page 1355</p> <p>1 isn't that correct? 2 A No. Because she wouldn't have done that. We 3 wouldn't have put him on the drill that he attended as 4 a key person to move, and we wouldn't have put his job 5 into a discussion on the drill that he attended. That 6 would just be horribly bad management and HR practice. 7 Q That's not my question. 8 A Then I misunderstood it. 9 Q That's okay. My question is: If he had 10 not -- since he was not a participant in her drills 11 after June, if his name had been listed, he would have 12 no way of -- I'm sorry -- if the position had been 13 listed, then he would have known that his position was 14 being -- was open and that he was being removed from 15 that position. That's all my question is. 16 MR. FASMAN: I'm going to object. 17 THE WITNESS: I'm sorry. 18 MR. FASMAN: It's a hypothetical. I 19 don't think -- 20 THE WITNESS: If he was no longer on the 21 drill, he wouldn't have seen anything happen in the 22 drill and he would have no knowledge. It's sort of an 23 impossible question. If he can't see it, then he 24 can't see it to know. 25 BY MR. CARTA:</p>
<p style="text-align: right;">Page 1354</p> <p>1 A Yes. All of her direct reports -- all the VPs 2 and some directors. 3 Q And isn't it true that once Mr. Echavarria 4 took his place as VP, that Mr. Castelluccio was no 5 longer a participant in her 5-minute drills? 6 A That is true, yes. 7 Q And that would have occurred in June of 2007, 8 is that correct? 9 A Thereabouts. Yeah. 10 Q So prior to June of 2007, he was a regular 11 participant in drills, and after that he was excluded 12 from those drills, isn't that correct, as a 13 participant? 14 A Yes. He was no longer qualified to attend the 15 drill. He was no longer a VP direct report. 16 Q Would you agree that if Ms. Collins-Smee had 17 identified Mr. Castelluccio as a person to move on one 18 of her drills before June at a time when he was 19 participating, then he would have seen from the drill 20 that she intended to remove him from the position of 21 VP of public sector? 22 A That would have been a reasonable inference if 23 that had happened, yes. 24 Q So if he was a participant prior to that, he 25 would have seen that she had intended to move him,</p>	<p style="text-align: right;">Page 1356</p> <p>1 Q That's exactly my point, and maybe my phrase 2 was inartfully asked. If he wasn't there, then there 3 would be no way for him to know, isn't that correct? 4 A If he wasn't -- 5 Q If he wasn't a participant in the drill. 6 A If he wasn't a participant in the drill, he 7 would not see what was in the drill. 8 MR. CARTA: Exhibit 29, please. 9 MR. FASMAN: Is that Plaintiff's? 10 MR. CARTA: Plaintiff's, yes. 11 BY MR. CARTA: 12 Q I think you testified a few moments ago that 13 you received this e-mail on or about February 28th, is 14 that right? 15 A Yes, that's right. 16 Q And at the time you received this e-mail, 17 isn't it true, as you told me in your deposition, that 18 Ms. Collins-Smee did not explain how she had come to 19 the decision to replace Mr. Castelluccio? Do you 20 remember telling me that at the time of your 21 deposition? 22 A Yes. 23 Q And isn't it also true that at the time of 24 your deposition you told me that she did not identify 25 you -- for you any alleged deficiencies in</p>

<p style="text-align: right;">Page 1357</p> <p>1 Mr. Castelluccio's performance at the time he received 2 this? 3 A Yes. 4 Q And when you gave me those answers, you were 5 under oath, isn't that correct? 6 A Yes. 7 Q And you told me the truth, I assume? 8 A Yes. 9 Q Those were truthful answers? 10 A Yes. 11 Q Do you recall whether you added anything to 12 Ms. Collins-Smee -- to Mr. Castelluccio's personnel 13 file after you received this e-mail? 14 A I did not, no. 15 Q Did you bring this to the attention of 16 Mr. Castelluccio? Did you speak to him about it at 17 that time? 18 A I did not, no. 19 MR. CARTA: Exhibit 138 -- Plaintiff's 20 138. 21 MR. FASMAN: I wonder if I can have a set 22 of exhibits for Mr. Holmes. 23 THE WITNESS: This book only runs to -- 24 BY MR. CARTA: 25 Q Take a moment and review the e-mail dated</p>	<p style="text-align: right;">Page 1359</p> <p>1 candidates for the VP of public sector position, isn't 2 that right? 3 A Yes, that is right. 4 Q And the e-mail -- if you look at the second 5 page, it seems as if -- am I correct that she was sent 6 a draft of the -- of her 5-minute drill for this 7 month, which would have been March? And she contacted 8 you because she saw that there was no slate of 9 candidates for the VP of public sector position, isn't 10 that right? 11 A No, that's not right. 12 Q What was the point of her contacting you, as 13 you understand it? 14 A The premise is not correct. This is an e-mail 15 about the Bob Zapfel 5-minute drill. 16 Q Oh, okay. This was Mr. Zapfel's drill? 17 A Yes. The initial note was sent by 18 Steve Jarrett. He was the vice president of HR, and 19 this -- as I described my role in Joanne's 5-minute 20 drill, Steve did the same for Bob Zapfel. 21 Steve put together the materials, sent it out 22 to people early. Joanne saw Bob Zapfel's drill 23 document, and it didn't include Jim's position. And 24 so she was inquiring about why it wasn't in Zapfel's 25 drill and what we would do to address that.</p>
<p style="text-align: right;">Page 1358</p> <p>1 March 5, 2007. 2 A Yes. I see, yes. 3 Q And is this an e-mail that Ms. Collins-Smee 4 sent to you? 5 A Yes, it is. 6 Q And you received it on or about March 5th, 7 2007? 8 A Yes, that's correct. 9 Q And that was just a few days after she had 10 made the decision to remove Mr. Castelluccio, isn't 11 that right, from his position of VP of public sector? 12 A Yes. About a week. 13 Q And she specifically asked you to add 14 Ken Wisse to her slate of candidates, isn't that 15 right? 16 A Yes. 17 Q And that was a routine procedure. Again, when 18 she wanted to have somebody added to her slate of 19 candidates, she would specifically request that and it 20 would be added. 21 A Yes. That's -- yes. On the slate, you would 22 start with a list generated by the system. We'd 23 refine it, and then she as a hiring manager could 24 refine it again. 25 Q And this concerns creating a slate of</p>	<p style="text-align: right;">Page 1360</p> <p>1 Q And she was asking you to be sure that that 2 position was listed on Mr. Zapfel's drill, isn't that 3 correct? 4 A Again, no. She asked me why it wasn't, and 5 she -- I told her that, while it wasn't officially in 6 the document, she could bring it up in the 7 conversation. And so I recommended that approach. 8 So we didn't miss that drill discussion, but 9 we wouldn't -- I think ultimately we wouldn't have the 10 details to put on a piece of paper to include it in 11 the outline that we saw earlier. 12 Q And so she's immediately following up to make 13 sure that Mr. -- that the VP position is listed on 14 Mr. Zapfel's drill. That's what this is. 15 A That's what this is, yes. 16 Q And did she follow up with you at the same 17 time or on or about the same time to be sure that 18 Mr. Castelluccio was listed on any of the drills? 19 A I don't recall. 20 Q You don't recall. 21 A I don't know if she followed up with me about 22 this drill, which would have been her second drill 23 with Zapfel, to include Jim as a key person in the 24 same drill that this was going on. I know he was in a 25 number of follow-up drills.</p>

<p style="text-align: right;">Page 1361</p> <p>1 Q Do you recall at the time of your deposition 2 you indicated that Mr. Castelluccio did not appear on 3 any of Ms. Collins-Smee's 5-minute drills as a key 4 person to discuss? Do you recall telling me that? 5 A Yes, I do. 6 Q And, in fact, to be fair, that's not right. 7 He was listed as a person to move on one. Do you now 8 know that? 9 A Actually, I have seen documents that show him 10 listed, but this was at the time that he was -- I 11 believe the time that he was on the bench towards the 12 end of his time at IBM. 13 Q Right. And that was the one and only time, 14 isn't that correct? 15 A I believe so, yes. 16 Q With respect to her drill? 17 A Yes. 18 Q Do you recall at the time of your deposition 19 you indicated that, with respect to Ms. Collins-Smee's 20 own 5-minute drills, that she, quote, rarely discussed 21 him on her drills. Do you recall that testimony? 22 A Yes. 23 Q And that's consistent with your recollection 24 that, with respect to her drills, she rarely discussed 25 Mr. Castelluccio, isn't that true?</p>	<p style="text-align: right;">Page 1363</p> <p>1 A Right. 2 Q And the prior discussion that you had with 3 her, I believe you testified that she raised the issue 4 of Mr. Castelluccio's retirement with you, isn't that 5 right? 6 A Yes. It was a topic that came up in the 7 conversation, yes. 8 Q And that was a conversation that just the two 9 of you had, there was no one else present, isn't that 10 right? 11 A That's right, yes. 12 Q Do you recall in that conversation whether 13 Ms. Collins-Smee shared with you the fact that 14 Mr. Castelluccio had already made it clear to her that 15 he had no interest whatsoever in retiring? 16 A In which conversation? 17 Q In the second conversation when she raised the 18 issue of his retirement. 19 A I don't recall that being that emphatic, "he 20 had no interest," no. No, I don't recall that. It 21 was a conversation about -- again, we were getting 22 toward the decision about what next, and that was one 23 of several options. It would have -- it wouldn't have 24 made sense to not even consider it. 25 Q Do you recall whether Ms. Collins-Smee shared</p>
<p style="text-align: right;">Page 1362</p> <p>1 A That's true, yes. There were rarely jobs -- 2 Q No question pending. 3 A -- that lined up with -- yes, that's true. 4 She rarely mentioned him on her drill. 5 Q And isn't it true that Mr. Castelluccio never 6 appeared on a slate of candidates on any of 7 Ms. Collins-Smee's drills? 8 A Yes, that's true. 9 Q So she rarely mentioned him, and he was never 10 on a slate of candidates. 11 And on one occasion when he was on the bench, 12 she listed him as a person to move, isn't that 13 correct? 14 A Yes. 15 Q Do you recall at the time of your deposition 16 that you told me that you had a recollection of two 17 different conversations in which you discussed 18 retirement -- I'm sorry -- Mr. Castelluccio's 19 retirement directly with Ms. Collins-Smee? Do you 20 remember that testimony? 21 A Yes. 22 Q And I think you said that the second of the 23 two conversations was on or about the time you were 24 preparing the talking points that we just went over, 25 isn't that right?</p>	<p style="text-align: right;">Page 1364</p> <p>1 with you the fact that Mr. Castelluccio had indicated 2 to her that he had no interest in retirement? Do you 3 recall telling me that before -- in your deposition, 4 that you don't recall her saying anything about his 5 interest in retiring? 6 A That was like three different statements of 7 the same question, which -- 8 Q You had this second discussion with -- 9 actually, yeah, the second discussion with 10 Ms. Collins-Smee. Do you remember when that took 11 place? At the time of your deposition, you had no 12 idea when it took place. Now do you have any idea 13 when it took place? 14 A The second conversation was as we were -- as 15 we were in probably April, May of 2008. 16 Q In 2008. So that was in connection with the 17 preparation of -- was that before or after the 18 discussion that had to do with the talking points? 19 A This was around the same time. Might have 20 even been in the same conversation. 21 Q At the time of your deposition, you told me 22 you recalled two distinct instances in which you -- in 23 which Ms. Collins-Smee raised the issue of 24 Mr. Castelluccio's retirement. Do you recall that? 25 A I do.</p>

<p style="text-align: right;">Page 1365</p> <p>1 Q And at the time of your deposition, you</p> <p>2 indicated you did not recall when the first of those</p> <p>3 two conversations took place. Do you recall that?</p> <p>4 A I do, yes.</p> <p>5 Q You were sure that the second one took place</p> <p>6 on or about the time you were discussing talking</p> <p>7 points. Do you remember that?</p> <p>8 A Yes.</p> <p>9 Q But you don't have any recollection of when</p> <p>10 the first conversation took place other than the fact</p> <p>11 that it was the two of you alone and that she raised</p> <p>12 it, isn't that correct?</p> <p>13 MR. FASMAN: I believe you said that "you</p> <p>14 don't have any." Are you talking about the time of</p> <p>15 the deposition or not?</p> <p>16 MR. CARTA: I'm talking about what he</p> <p>17 said at the time of the deposition.</p> <p>18 MR. FASMAN: All right. Thank you.</p> <p>19 THE WITNESS: Oh, yes. I did say that,</p> <p>20 yes, at the time of the deposition.</p> <p>21 BY MR. CARTA:</p> <p>22 Q I'm going to move on to a couple of questions</p> <p>23 about being on the bench.</p> <p>24 Am I correct that being on the bench refers to</p> <p>25 the status of an executive who doesn't have a defined</p>	<p style="text-align: right;">Page 1367</p> <p>1 him find a position, isn't that correct?</p> <p>2 A That he made it -- I don't know if he did that</p> <p>3 very early on.</p> <p>4 Q You don't have a recollection of when he did</p> <p>5 it, but --</p> <p>6 A No, I don't.</p> <p>7 Q But you're sure that he made that clear.</p> <p>8 A Yeah. I -- from conversations and from the</p> <p>9 evidence I saw when I saw a document of the 5-minute</p> <p>10 drill about him being open to Band C or Band D jobs.</p> <p>11 Q And isn't it your understanding that he did</p> <p>12 that in order to optimize his chances for getting a</p> <p>13 position at IBM so he could continue his career there?</p> <p>14 A Yes. That would be my understanding. That's</p> <p>15 why anyone would do it, I think.</p> <p>16 Q Right. And is there any doubt in your mind</p> <p>17 that he had communicated that willingness to move from</p> <p>18 a band -- move down a band to Ms. Collins-Smee? She</p> <p>19 was aware of that, wasn't she?</p> <p>20 A Yes. She wrote it in the 5-minute drill. She</p> <p>21 told me. She told others, yes. There's no doubt in</p> <p>22 my mind she was aware of that.</p> <p>23 Q And were you also aware that Mr. Castelluccio</p> <p>24 indicated that he would be willing to relocate if</p> <p>25 that's what it took to get a job?</p>
<p style="text-align: right;">Page 1366</p> <p>1 full-time position?</p> <p>2 A Yes, that is correct.</p> <p>3 Q And do you recall explaining to me at the time</p> <p>4 of your deposition that it was typical -- that it was</p> <p>5 typical for an executive who is assigned to the bench</p> <p>6 for a period of time to have work assigned to them</p> <p>7 while they were on the bench? Do you recall that</p> <p>8 testimony?</p> <p>9 A Yes, I do recall that testimony.</p> <p>10 Q And, in fact, that is consistent with your</p> <p>11 experience, that someone who is on the bench would</p> <p>12 have the opportunity to have work assigned to them</p> <p>13 while they were on the bench, isn't that correct?</p> <p>14 A Yes. That he would have the opportunity to</p> <p>15 have work assigned if there was work to assign.</p> <p>16 Q I'm going to go back to this issue of</p> <p>17 Mr. Castelluccio's openness to whatever position he</p> <p>18 could get.</p> <p>19 In your capacity as the HR director for IT, do</p> <p>20 you recall learning that, in fact, Mr. Castelluccio</p> <p>21 had made it clear that he was willing to step down</p> <p>22 from a Band C position to a Band D position?</p> <p>23 A Yes. I was aware of that.</p> <p>24 Q And he made that clear very early on, that he</p> <p>25 would be willing to take that move if that would help</p>	<p style="text-align: right;">Page 1368</p> <p>1 A I didn't know that, no.</p> <p>2 Q Do you remember discussions about</p> <p>3 Mr. Castelluccio's willingness to move outside of the</p> <p>4 umbrella of the Americas, ITD Americas, in order to</p> <p>5 find a job if that's what was necessary?</p> <p>6 A Yeah. I recall that being part of the</p> <p>7 conversation.</p> <p>8 Q And you recall that being part of the</p> <p>9 conversation because Mr. Castelluccio had indicated</p> <p>10 his willingness to do that, isn't that right, to move</p> <p>11 beyond just ITD Americas group if that's what it took?</p> <p>12 A He didn't indicate it to me. I just know as</p> <p>13 part of my conversations about Jim and movement that</p> <p>14 that was an option. He and I -- I don't think we ever</p> <p>15 talked about those specifics.</p> <p>16 Q So you didn't know it from a specific</p> <p>17 conversation with him, but you knew it from what you</p> <p>18 observed concerning his openness on the 5-minute</p> <p>19 drills --</p> <p>20 A Yes.</p> <p>21 Q -- in terms of positions?</p> <p>22 A Yeah. That was part of the profile. That was</p> <p>23 part of the info.</p> <p>24 Q Exhibit 224, Plaintiff's 224, please.</p> <p>25 A I'm sorry. Which number?</p>



<p style="text-align: right;">Page 1369</p> <p>1 Q 224. I think you've got that, but if not, let 2 me know. 3 A Again, I need one more book. I need Volume 3 4 of 3. 5 Q Mr. Holmes, do you recognize this as one of 6 Bob Moffat's drills? 7 A Actually, I think this, too, is a Bob Zapfel 8 drill. 9 Q If you look at the top, it says "IO"? 10 A Yeah. It says IO 5-minute drill for ITD. So 11 IO was the Bob Zapfel -- the senior vice president 12 organization. ITD was underneath it. That was the 13 Bob Zapfel drill. 14 And as I just looked at the number of 15 executives in the jobs and the level of jobs that are 16 included, it does appear to me to be a Bob Zapfel 17 drill, because it's got band -- it's got 18 director-level jobs in it. And I don't think 19 director-level jobs would have been reviewed by 20 Moffat. 21 Q Okay. Fine. It was one of Mr. Zapfel's 22 drills? 23 A Yes. 24 Q And it was a drill that was dated and 25 conducted on around April 5, 2007?</p>	<p style="text-align: right;">Page 1371</p> <p>1 Do you see that? 2 A Yes, I see that. 3 Q And that's consistent with what you testified 4 before, which was that Ms. Collins-Smee was anxious to 5 have that role filled as soon as possible, is that 6 correct? 7 A That's correct, yes. 8 Q And do you see the other highlighted sentence? 9 It's probably up on your screen. "We don't have a 10 role for Jim yet. He's going to help on WellPoint." 11 Do you see that? 12 A Yes, I do. 13 Q Now, as I understand it -- question withdrawn. 14 Do you agree with me -- take a moment and read 15 the entire notes, please. 16 Would you agree with me that there's nothing 17 there whatsoever that states that the role of 18 permanent DPE on the WellPoint account is being 19 assigned to Mr. Castelluccio? 20 A I would agree that there's nothing there that 21 states this is -- that WellPoint would be a permanent 22 role. 23 Q Thank you. Would you look at page 7 and 8 for 24 a moment, please? 25 A I'm sorry?</p>
<p style="text-align: right;">Page 1370</p> <p>1 A Yes. 2 Q I'd like to direct -- so April 5, 2007, that 3 was -- we'll get to that. 4 Directing your attention to page 3, please. 5 A Page 3? Yes. 6 Q Do you see that on this drill, a position is 7 listed as open -- the VP of public sector position is 8 open, and Mr. Castelluccio is reported as being the 9 incumbent? 10 A Yes. 11 Q That means that he's currently in that 12 position, is that right? 13 A Yes. 14 Q And what's in the Boxer immediately to the 15 right of that? What are those notes? 16 A Those appear to be discussion notes from the 17 actual exchange on the 5-minute drill call. 18 Q The discussion notes -- and that was the 19 standard procedure, was it not, that -- for somebody 20 to take notes of what was being discussed on the 21 drill? 22 A Yes, that was standard. Typical. 23 Q So you see in the discussion notes it says: 24 "Joanne would like to get Miguel in this role in the 25 next 30 days."</p>	<p style="text-align: right;">Page 1372</p> <p>1 Q Would you turn to page 7 and 8? 2 On the bottom of page 7, it talks about key 3 people to move. 4 Do you see that? 5 A Yes, I do. 6 Q And do you see where it says "Executive 7 Sponsor"? 8 A Yes, I do. 9 Q And what is the role? What is the function of 10 an "executive sponsor"? 11 A The function of the executive sponsor is to 12 discuss, clarify, provide information about the people 13 listed against his or her name in the course of a 14 5-minute drill discussion. 15 Q And do you recall at the time of your 16 deposition you stated to me executive sponsor was the 17 person participating in the call to whom the group 18 would look to discuss the person to move? Do you 19 recall giving me that testimony? 20 A Yes. 21 Q And that's correct, that the executive sponsor 22 would be the one that everyone else in the group would 23 rely on to be an advocate for the person who was 24 identified in the Key People to Move section? 25 MR. FASMAN: Objection. That's not what</p>



<p style="text-align: right;">Page 1373</p> <p>1 he testified to.</p> <p>2 MR. CARTA: I'm asking him.</p> <p>3 THE WITNESS: I'm sorry. Again, please?</p> <p>4 BY MR. CARTA:</p> <p>5 Q Sure. Isn't it true that the executive</p> <p>6 sponsor would be the person that everybody else on the</p> <p>7 drill would look to, to be the advocate for the person</p> <p>8 who was listed in the Key People to Move section?</p> <p>9 A No. They would be the person they would look</p> <p>10 to, to answer questions or to provide information.</p> <p>11 Anybody could be an advocate on the call.</p> <p>12 Q Who would be the person who had -- well, let's</p> <p>13 look at what you said.</p> <p>14 Do you recall telling me at the time of your</p> <p>15 deposition that if an executive sponsor does not</p> <p>16 advocate for an employee, that that will negatively</p> <p>17 impact on the employee's ability to find a position at</p> <p>18 IBM?</p> <p>19 A Are you asking me if I said that?</p> <p>20 Q If that's what you indicated to me, yes.</p> <p>21 A Oh, if that's what I indicated?</p> <p>22 Q Yes.</p> <p>23 A Oh, okay. Yes, I indicated that. I did not</p> <p>24 say that.</p> <p>25 THE COURT: Ladies and gentlemen, I'm</p>	<p style="text-align: right;">Page 1375</p> <p>1 THE COURT: You're welcome.</p> <p>2 Gentlemen, and ladies, have a good pleasant</p> <p>3 lunch. I know it's really, really cold out there.</p> <p>4 See you at 1:45.</p> <p>5 (Recess taken from 1:03 p.m. to 1:53 p.m.)</p> <p>6 THE COURT: Please be seated. I hope you</p> <p>7 had a nice lunch, had enough time to get it and</p> <p>8 consume it and enjoy it.</p> <p>9 Mr. Carta, ready to resume?</p> <p>10 MR. CARTA: Thank you, Your Honor.</p> <p>11 BY MR. CARTA:</p> <p>12 Q Welcome back, Mr. Holmes.</p> <p>13 Let me pick up where I left off. I was asking</p> <p>14 you a question about your prior testimony.</p> <p>15 Do you recall at the time of your deposition I</p> <p>16 asked you this question: "In your experience, if an</p> <p>17 executive" -- I'm sorry -- page 136, line 6 through</p> <p>18 10. That won't be among the documents.</p> <p>19 "In your experience, if an executive sponsor</p> <p>20 doesn't advocate for an employee, does that impact on</p> <p>21 the employee's finding a new position at IBM"?</p> <p>22 And you're answering "Yes."</p> <p>23 A Yes.</p> <p>24 Q Do you recall that?</p> <p>25 A Yes.</p>
<p style="text-align: right;">Page 1374</p> <p>1 noticing it's 12 o'clock.</p> <p>2 THE JURORS: 1 o'clock.</p> <p>3 THE COURT: Excuse me, 1 o'clock. Would</p> <p>4 you be able to have your lunch break in 45 minutes</p> <p>5 rather than the customary hour long? So we'll take</p> <p>6 our lunch break from now to 1:45. Thank you.</p> <p>7 (Jurors excused)</p> <p>8 THE COURT: I've been advised by the</p> <p>9 clerk that a juror -- and I don't know who that juror</p> <p>10 is -- but a juror wanted to inform the Court that she</p> <p>11 has a business trip scheduled for Monday and has plane</p> <p>12 tickets in connection with that. So we have to finish</p> <p>13 this case this week, because we can't go over to</p> <p>14 Monday. So I think you ought to know that.</p> <p>15 MR. FASMAN: Again, that's fine with us.</p> <p>16 We have two brief witnesses this afternoon. At least</p> <p>17 the direct's brief. And then we'll have Dr. Sodikoff</p> <p>18 here tomorrow morning, and we're done.</p> <p>19 THE COURT: Okay.</p> <p>20 MR. FASMAN: I don't know whether there's</p> <p>21 going to be a rebuttal case or not.</p> <p>22 THE COURT: Fine. Just wanted to keep</p> <p>23 you abreast of what I know about the case, and I think</p> <p>24 you should know about it, too.</p> <p>25 MR. FASMAN: Thank you, Your Honor.</p>	<p style="text-align: right;">Page 1376</p> <p>1 Q I'd like to turn to page 4 of Exhibit 244,</p> <p>2 please. That's an exhibit we had up on the screen a</p> <p>3 moment ago. And if you would just confirm that what</p> <p>4 we're looking for is one of the positions that's</p> <p>5 listed under Key Positions. I think that's on the</p> <p>6 prior page -- two pages.</p> <p>7 A I'm sorry. What was the --</p> <p>8 Q Sure. If you look at Exhibit 244.</p> <p>9 A Looks like I've got something different. I'll</p> <p>10 just look at the screen.</p> <p>11 It's in your binder?</p> <p>12 Q Yes. It's one of the maroon binders, 244.</p> <p>13 I'm going to ask you several questions from it, so it</p> <p>14 would be helpful if you did have it in front of you.</p> <p>15 A 234 was it, maybe?</p> <p>16 Q No. I believe it's 244.</p> <p>17 MS. TRIOLO: 124?</p> <p>18 THE WITNESS: 224.</p> <p>19 BY MR. CARTA:</p> <p>20 Q 224. I'm sorry.</p> <p>21 A Okay. Yes. Page 4? Yes, I have it.</p> <p>22 Q And if you look on page 1 -- on page 2,</p> <p>23 rather, it lists key positions. Do you see that at</p> <p>24 the bottom of the page?</p> <p>25 A Yes.</p>

<p style="text-align: right;">Page 1377</p> <p>1 Q And then in the Key Positions area, if you 2 flip to page 4, there's a discussion about the senior 3 DPE position at WellPoint. 4 A Yes. 5 Q Do you see that? 6 A Yes. 7 Q And I think you've identified this as 8 Mr. Zapfel's drill of April of 2007. 9 A Yes, I did. 10 Q So this would be the month after Mr. Morin had 11 resigned, right? 12 A Yes. 13 Q Okay. And if you take a moment and review the 14 comment section, in particular Mr. Zapfel's comments, 15 and just let me know when you've had a chance to do 16 that. 17 A Okay. Yes. 18 Q And isn't it true that in that section 19 Mr. Zapfel expressed concern about assigning Ken Wisse 20 to this account if he's going to be asked to split his 21 time? 22 A Yes. That's what it says here. 23 MR. FASMAN: There's no foundation for 24 this. It's not clear that he was there. It says what 25 it says.</p>	<p style="text-align: right;">Page 1379</p> <p>1 A That's not what this says. He said might 2 happen, but didn't say he would expect it. 3 Q So it's your testimony that he may have them 4 or he may not have them, and that's what Zapfel's 5 saying, just hypothetically. 6 A Yes. 7 Q You don't think that Mr. Zapfel is expressing 8 a concern that there would be potential problems with 9 having somebody on the WellPoint account not 10 full-time. 11 MR. FASMAN: Your Honor, the document 12 says what it says. There's no evidence the witness 13 was there. There's no evidence the witness heard 14 Mr. Zapfel. Mr. Carta's arguing about what a document 15 says with the witness. 16 MR. CARTA: I think it's a legitimate 17 question, Your Honor. 18 THE COURT: The document does say that. 19 At least it suggests concerns over that problem. 20 MR. CARTA: Okay. I'll move on. Very 21 well. 22 THE COURT: Do you agree with that? If 23 you want to probe that and go into the reasons why 24 Mr. Zapfel might have those feelings, you're free to 25 do that, if that was what you were doing and that was</p>
<p style="text-align: right;">Page 1378</p> <p>1 THE COURT: Okay. Well -- 2 BY MR. CARTA: 3 Q Based upon your understanding of the way these 4 notes work, is it your understanding that this 5 comment, where it says "Zapfel" is actually a 6 statement made by Mr. Zapfel? 7 A Yes. That's my understanding of what's in the 8 document here. 9 Q Exactly. And with respect to Mr. Zapfel's 10 concern, as I read this, he's concerned that Mr. Wisse 11 might be splitting his time 80 percent on WellPoint 12 and 20 percent on Nissan. Is that the division that 13 he's concerned about? 14 A Yeah. That's -- well, that's what I would 15 infer from the statement about him being 20 percent on 16 Nissan. 17 Q And Mr. Zapfel goes on the state, quote, we 18 might have customer issues if Ken is split between two 19 accounts. Isn't that correct? 20 A Yes. 21 Q And you'd agree with Mr. Zapfel that customer 22 issues could be expected if you assign somebody on a 23 non-full-time basis to the position of DPE on 24 WellPoint at that point in time, you'd agree with 25 Mr. Zapfel, wouldn't you?</p>	<p style="text-align: right;">Page 1380</p> <p>1 where you were going. But I think the document's 2 pretty clear on its face, that he was concerned that 3 WellPoint would have to know this. 4 THE WITNESS: Right. 5 BY MR. CARTA: 6 Q If you would take a look at pages 7 through 8, 7 please, on the same drill. And I'd like to direct 8 your attention to the Key People to Move section of 9 this drill, please. 10 A Okay. 11 Q And there appear to be five different people 12 listed as key people to move. 13 And my question is: Is Ms. Collins-Smee the 14 executive sponsor for four of those five people? 15 A Yes. 16 Q And although Ms. Collins-Smee is seeking in 17 this 5-minute drill final approval for Mr. Echavarria, 18 which we discussed already to replace 19 Mr. Castelluccio, did he appear anywhere among the 20 list of key people to move on this -- key people to 21 move on this list? 22 A He does not appear on this list, no. 23 Q So four of the five are people that she's 24 listed, but she doesn't list Mr. Castelluccio on this, 25 isn't that correct?</p>

<p style="text-align: right;">Page 1381</p> <p>1 A Yes, that is correct.</p> <p>2 Q Okay. I'd like to have you go back to page 1,</p> <p>3 and we're going to talk again about the key positions</p> <p>4 available. If you'd just take a minute -- as I</p> <p>5 counted it up, I believe there are a total of 11 key</p> <p>6 positions identified. And that goes from page 1</p> <p>7 through page 7. Some of them have slates, some of</p> <p>8 them don't.</p> <p>9 A I count ten, but...</p> <p>10 Q Okay. I believe one of those positions is</p> <p>11 actually the senior DPE position, and we've already</p> <p>12 seen that he's not -- Mr. Castelluccio is not</p> <p>13 identified on that slate of candidates. And I think</p> <p>14 another of those positions looks like it's actually</p> <p>15 just for approval.</p> <p>16 If you look at the top of page 6, it says:</p> <p>17 "Director Unix Intel." So this wouldn't have been a</p> <p>18 position that had a slate because this was here just</p> <p>19 for approval, isn't that right?</p> <p>20 A It's not clear from what's here.</p> <p>21 Q Okay. Well, we'll count that in. We'll take</p> <p>22 from the list of ten -- we'll take out the DPE</p> <p>23 position because we already know he's not at that time</p> <p>24 considered a candidate. He's not on the slate.</p> <p>25 But with respect to the other nine positions,</p>	<p style="text-align: right;">Page 1383</p> <p>1 testified to.</p> <p>2 BY MR. CARTA:</p> <p>3 Q Okay. But you agree that there's no reference</p> <p>4 to him on page 4 where the position is being discussed</p> <p>5 on Mr. Zapfel's 5-minute drill; and there actually is</p> <p>6 a slate of candidates, including a lead candidate, and</p> <p>7 two other candidates, isn't that correct? No</p> <p>8 reference to him whatsoever on this document -- on</p> <p>9 this part of the document.</p> <p>10 A I don't see -- yes, I don't see any reference.</p> <p>11 I agree there's no reference to Jim on page 4 of this</p> <p>12 document.</p> <p>13 Q Plaintiff's 90. If you'd just take a moment</p> <p>14 and see if you recognize this e-mail. It's an e-mail</p> <p>15 sent by Ms. Collins-Smee -- it's actually a series of</p> <p>16 e-mails. If you look towards the bottom of the page</p> <p>17 where there's an e-mail from Ms. Collins-Smee to a</p> <p>18 Mark Hennessy. Do you see that?</p> <p>19 A Yes, I do. Now I see it.</p> <p>20 Q I'm sorry, Mr. Holmes. I didn't hear your</p> <p>21 answer. You said now you see it?</p> <p>22 A Yes. There are a couple in the string. So</p> <p>23 yes.</p> <p>24 MR. CARTA: And may I have Exhibit 91 up,</p> <p>25 please? Plaintiff's 91?</p>
<p style="text-align: right;">Page 1382</p> <p>1 isn't it correct that he's not on the slate for any of</p> <p>2 those other nine positions?</p> <p>3 A Yeah. I don't see him on any of the slates</p> <p>4 for the key positions.</p> <p>5 Q And he's clearly not on the slate of</p> <p>6 candidates for the senior DPE position, right, in</p> <p>7 April of 2007?</p> <p>8 A Which senior DPE position?</p> <p>9 Q That's on page 4.</p> <p>10 A Oh, okay. Senior DPE, no, he's not listed.</p> <p>11 Q And this is the position that Ms. Collins-Smee</p> <p>12 has testified that she actually placed him on as of</p> <p>13 April 1st, isn't that correct?</p> <p>14 MR. FASMAN: I would object.</p> <p>15 How would he know that?</p> <p>16 THE COURT: Sustained.</p> <p>17 BY MR. CARTA:</p> <p>18 Q Mr. Holmes, are you aware of the fact that</p> <p>19 Ms. Collins-Smee testified that she assigned</p> <p>20 Mr. Castelluccio full-time to the DPE WellPoint</p> <p>21 position as of April 1st? Are you aware of that?</p> <p>22 MR. FASMAN: Same objection.</p> <p>23 THE COURT: Overruled. Do you know?</p> <p>24 It's yes or no.</p> <p>25 THE WITNESS: I don't know what she</p>	<p style="text-align: right;">Page 1384</p> <p>1 BY MR. CARTA:</p> <p>2 Q Again, there's two e-mails here, but if you</p> <p>3 look in the middle, it's another e-mail from</p> <p>4 Ms. Collins-Smee. In this case, it's to</p> <p>5 Elizabeth Smith, and the subject is GW Castelluccio</p> <p>6 resumé. Do you see that?</p> <p>7 A Yes. JG Castelluccio resumé.</p> <p>8 Q JG, yes, correct.</p> <p>9 A Yes, I see that.</p> <p>10 Q And basically, the text of the two e-mails is</p> <p>11 almost exactly the same. It's indicating she's</p> <p>12 attached a copy of the highlight of Mr. Castelluccio's</p> <p>13 accomplishments. Do you see that?</p> <p>14 A No.</p> <p>15 Q "Jim Castelluccio is available for a new</p> <p>16 position and attached below is a highlight of his</p> <p>17 accomplishments."</p> <p>18 A Oh, yes, yes. I see that, yes. I didn't see</p> <p>19 the attachment. I do see that it's mentioned.</p> <p>20 Q As you sit here now, are you aware of any</p> <p>21 other similar written communications sent by</p> <p>22 Ms. Collins-Smee on behalf of Mr. Castelluccio?</p> <p>23 A There may have been, or at least these two may</p> <p>24 be the ones that I remember her sending. I don't</p> <p>25 remember the exact number. I know she sent several.</p>

<p style="text-align: right;">Page 1385</p> <p>1 Q And are you aware of any others besides these</p> <p>2 two?</p> <p>3 A Again, I don't know -- not specifically. I</p> <p>4 don't know if these are the two I recall seeing or,</p> <p>5 you know, I can't say -- no. I don't know that these</p> <p>6 are the only ones.</p> <p>7 Q You don't have any specific recollection of</p> <p>8 any others, isn't that fair to say?</p> <p>9 A That's fair to say, yes, I have no specific</p> <p>10 recollection.</p> <p>11 Q And these are dated, I think the same day, May</p> <p>12 21, 2008?</p> <p>13 MR. FASMAN: Objection. I don't think</p> <p>14 they are.</p> <p>15 THE WITNESS: Yeah. This one's the 20th.</p> <p>16 BY MR. CARTA:</p> <p>17 Q I'm sorry. One's the 21st. I was reading the</p> <p>18 top e-mail. One's the 21st from Mr. Hennessy, and the</p> <p>19 other is -- I apologize. The other is the 20th to</p> <p>20 Elizabeth Smith.</p> <p>21 A Um-hmm.</p> <p>22 Q And at this point in time, Mr. Castelluccio</p> <p>23 had been on the bench for a full five months, isn't</p> <p>24 that correct?</p> <p>25 A Yes.</p>	<p style="text-align: right;">Page 1387</p> <p>1 get that correctly?</p> <p>2 A No.</p> <p>3 Q What was your role in preparing this document?</p> <p>4 A I had no role in preparing it.</p> <p>5 Q Did Mr. Fasman review it with you?</p> <p>6 A Yes.</p> <p>7 Q I thought that's what he had said.</p> <p>8 Okay. So let's look at the time frame, for</p> <p>9 starters. That concerns 2007 to 2011, is that right?</p> <p>10 A Right.</p> <p>11 Q And Mr. Castelluccio left or was fired midway</p> <p>12 through 2008, is that right?</p> <p>13 A He left midway through 2008.</p> <p>14 Q He left. You're saying he wasn't fired?</p> <p>15 A I'm answering one of your questions. You said</p> <p>16 he left or he was fired. I answered that he left.</p> <p>17 Q Okay. So you'd agree, then, that more than</p> <p>18 half of this graph has nothing to do with the time</p> <p>19 period in which Mr. Castelluccio was employed by IBM?</p> <p>20 MR. FASMAN: Objection, argument.</p> <p>21 THE COURT: Overruled.</p> <p>22 THE WITNESS: Three of the five years are</p> <p>23 post his time there, so I would agree.</p> <p>24 BY MR. CARTA:</p> <p>25 Q Three and a half of the years are post his</p>
<p style="text-align: right;">Page 1386</p> <p>1 Q And these are the only ones that you're aware</p> <p>2 of, isn't that correct?</p> <p>3 A No. There was a -- I recall her sending</p> <p>4 similar e-mails earlier in the year at the time that</p> <p>5 he first went on the bench. But I don't know if they</p> <p>6 were to these same people or to others.</p> <p>7 Q Have you seen them in the process of getting</p> <p>8 up to speed for this lawsuit? Have you seen any other</p> <p>9 e-mails?</p> <p>10 A I have not, no.</p> <p>11 Q Have you had complete access to any</p> <p>12 information that you wanted in order to prepare for</p> <p>13 today's testimony in connection with the issues in</p> <p>14 this lawsuit?</p> <p>15 A I had access to what was given to me.</p> <p>16 Q And based upon what was given to you, you're</p> <p>17 not aware of any other e-mails, is that right?</p> <p>18 A I have not seen any other e-mails.</p> <p>19 MR. CARTA: I'm not sure what exhibit</p> <p>20 number this is. Is this your exhibit?</p> <p>21 MR. FASMAN: Yeah. It's a demonstrative.</p> <p>22 I don't know if we put a number on it.</p> <p>23 BY MR. CARTA:</p> <p>24 Q Now, as I understand it, Mr. Fasman said that</p> <p>25 you assisted him in preparing this document. Did I</p>	<p style="text-align: right;">Page 1388</p> <p>1 time period, isn't that correct?</p> <p>2 A Yes, that's correct.</p> <p>3 Q And where it says -- on the blue color where</p> <p>4 it says Band D, see that?</p> <p>5 A Yes.</p> <p>6 Q And let's just look at one of the few parts of</p> <p>7 the graph that's at all relevant.</p> <p>8 2008, what's that "N 1" mean?</p> <p>9 A One person was the population.</p> <p>10 Q So this portion of the graph is based on one</p> <p>11 data point? One data point? One person, is that</p> <p>12 right?</p> <p>13 A That is right.</p> <p>14 Q And is that -- do you know who that one person</p> <p>15 is?</p> <p>16 A I don't recall specifically, no.</p> <p>17 Q Could that be Mr. Crawford? Mr. Crawford</p> <p>18 replaced Mr. Castelluccio in the position as DPE.</p> <p>19 A I don't think so, because -- no, it couldn't</p> <p>20 be.</p> <p>21 Q Why? Was he not a Band D?</p> <p>22 A He was not a Band D.</p> <p>23 Q So Mr. Crawford's numbers, then, would have</p> <p>24 been in the Band C?</p> <p>25 A Right.</p>

<p style="text-align: right;">Page 1389</p> <p>1 Q And how many data points is that based on? I 2 can't see from here. 3 A "N" equals nine. 4 Q So those are nine. And with respect to 2007, 5 that average calculation for number of people in 6 Band D is based upon just three people, isn't that 7 right? 8 A That is right. 9 Q So in terms of the information on this graph, 10 with respect to what it shows with respect to Band D, 11 you're talking about a total -- well, actually, 12 withdrawn. 13 Do you happen to know whether the Band D 14 person in 2008 was also one of the three people 15 considered in the graph for 2007? 16 A No, I don't know. 17 Q You don't know. Could be one of the same 18 people, right? 19 A Could be. 20 Q So either -- with respect to the information 21 communicated by this graph, we're talking about either 22 a total of three or possibly four people, isn't that 23 right? 24 A Yes. 25 Q I've talked about the fact that the graph goes</p>	<p style="text-align: right;">Page 1391</p> <p>1 Q People were reporting to Ms. Collins-Smee 2 certainly in 2005 and 2006, but just in a different 3 capacity, isn't that right? 4 A None of the people in this data set. 5 Q Okay. That wasn't my question. My question 6 was, weren't people directly reporting to 7 Ms. Collins-Smee in 2005 and 2006? 8 A Yes. 9 Q You've testified that in your judgment it's 10 possible to be on too many drills. Do you remember 11 saying that to the jurors? 12 A Yes, I do remember that. 13 Q And I believe that you testified that people 14 might stop asking and get bored with the fact that 15 somebody is on a drill repeatedly. Is that a fair 16 summary of what you said? 17 A Yes. 18 Q If you were an employee about to be terminated 19 for not having a job, is that a chance you'd be 20 willing to take, being on more than a certain number 21 of drills? 22 A That's a hypothetical. 23 Q I'm asking you in your judgment -- we've heard 24 about your judgment in terms of accepting a Level 10 25 position. I want to know what you'd do. Would you</p>
<p style="text-align: right;">Page 1390</p> <p>1 down to 2011. Since you had some involvement with 2 this graph, do you know any reason why the graph 3 doesn't address averages for 2005 or 2006? 4 A I do not. 5 Q Did you ask? 6 A I did not. 7 Q You just accepted what they showed you, right? 8 MR. FASMAN: Your Honor, I mean, 2005 -- 9 this is titled "Average Age of Band C and D Employees 10 Who Reported to Collins-Smee." The testimony was 11 pretty clear that she came in, in February 1, 2007. 12 MR. CARTA: It doesn't say -- Your Honor, 13 it doesn't say with respect to what position. 14 THE COURT: Maybe if you ask the question 15 again. 16 MR. CARTA: I think he's actually 17 answered the question. I'll move on. His answer is 18 he doesn't know why it doesn't address earlier years, 19 and that's fine. 20 THE COURT: Is that indeed your answer? 21 THE WITNESS: As I look at the chart now, 22 I see that I understand the reason it doesn't, because 23 this is people who reported to Joanne Collins-Smee, 24 and she was not in the job before 2007. 25 BY MR. CARTA:</p>	<p style="text-align: right;">Page 1392</p> <p>1 prefer to have been on no drill -- question withdrawn. 2 Would you prefer not to have continued to be 3 on a drill and not have a job rather than have what 4 you said was possible overexposure? 5 A No, I would not. 6 Q You'd rather be on the drill, wouldn't you? 7 A No. I didn't say I would not rather be on the 8 drill. 9 Q You'd rather not have a job? That's your 10 testimony? 11 A That's not the choice. You don't lose a job 12 because you're not on the drill. I would prefer to 13 have the audience paying attention to and supporting 14 my candidacy rather than have them say, Why do you 15 keep bringing up this guy? Or if there wasn't a real 16 job, it's not helpful. 17 Q Okay. That's not my -- 18 A I understand why people make those choices, 19 and I would respect and understand if somebody made 20 that choice on my behalf. 21 Q That really wasn't my question, so I'll ask 22 again. 23 If you were in a position where you were going 24 to be losing your job and the choice was either 25 between losing your job and --</p>



<p style="text-align: right;">Page 1393</p> <p>1 Well, let me ask you: Did you ever ask 2 Mr. Castelluccio whether he was concerned about being 3 overexposed on the 5-minute drills? 4 A No. 5 Q To your knowledge, did Ms. Collins-Smee ever 6 ask him, Jim, we know that you're getting close to the 7 end here. We might not want to overexpose you. Is it 8 okay if we keep you on the 5-minute drill? 9 Do you know if she ever had a conversation 10 with him that was like that? 11 A I don't see why she would, because as he was 12 getting close to the end, he was on 5-minute drills. 13 Q Not on her drill. Not on her drill, isn't 14 that right? You've admitted that. 15 A As I recall, he did show up on at least one of 16 her drills towards the time that -- 17 Q That's correct. One out of all of her drills, 18 which you said were held on a regular basis, isn't 19 that right? 20 A That is right. 21 Q And in that one drill, he appeared as a person 22 who was available, correct? 23 A I don't recall. I'd have to see the document. 24 Q Do you recall whether he was ever listed on 25 any of her drills as a -- on a slate of candidates?</p>	<p style="text-align: right;">Page 1395</p> <p>1 That's one step. D to Band 10 is another step, right? 2 A Right. 3 Q At my request, did you take a look at the top 4 of the salary range for Band 10 positions in 2009? 5 A Yes, I did. 6 Q What was the top of the salary range for 7 Band 10? 8 MR. CARTA: Objection, Your Honor. 2009? 9 MR. FASMAN: Yes, I asked him for -- 10 well, let's ask it this way. 11 BY MR. FASMAN: 12 Q Did you look for 2008? 13 A I could not -- yes, I looked for 2008. I 14 could not find that data. 15 MR. FASMAN: I think we should be able to 16 at least give the jury an idea of what the salary 17 range would have been or the top of the range. 18 MR. CARTA: Your Honor, 2009 compensation 19 is completely irrelevant. We're talking about many 20 years from Mr. Castelluccio's termination. His last 21 salary was pegged at 2007. 22 THE COURT: I'll allow it. 23 BY MR. FASMAN: 24 Q What's the number? 25 A The highest salary range for a Band 10 in 2009</p>
<p style="text-align: right;">Page 1394</p> <p>1 A I don't recall that he was, no. 2 MR. CARTA: No further questions. 3 THE COURT: Mr. Fasman? 4 MR. FASMAN: Thank you, Your Honor. 5 6 REDIRECT EXAMINATION BY MR. FASMAN: 7 8 Q Good afternoon. Mr. Holmes, just a few quick 9 questions. 10 5-minute drills, just so it's clear, are not 11 the piece of paper, right? It's the meeting. 12 A Right. The 5-minute drill is a discussion. 13 It's just -- the drill document is to drive the agenda 14 and capture notes. 15 Q Okay. At my request, there was some questions 16 about a Band C-level executive getting down to a 17 Band 10 move, and I think you said it was 18 extraordinary. What did you mean by that? 19 A I meant the literal meaning of extraordinary. 20 It was out of the ordinary. It was -- I had seen it 21 or even heard of it so rarely that it would be out of 22 the ordinary. It would be unusual. 23 Q Nothing would prevent it, though, right? 24 A No, nothing would prevent it. 25 Q And if you wanted to go from C to D, right?</p>	<p style="text-align: right;">Page 1396</p> <p>1 was \$395,000. 2 Q Okay. You mentioned -- there were a number of 3 hypothetical questions about adding Mr. Castelluccio 4 to Ms. Collins-Smee's drill, and about one of them, 5 you said it would be horribly bad human resources 6 practice. Do you remember that? 7 A Yes, I do remember that. 8 Q What was it that would be horribly bad human 9 resources practice in terms of bringing him into a 10 drill? 11 A As I recall, the question was about bringing 12 the vice president of public sector job into the drill 13 for Joanne and her direct reports. 14 The purpose -- or people should participate in 15 the 5-minute drill who have either a decision-making 16 responsibility or a need to know the information 17 that's being discussed. And it would be, in my 18 opinion, very bad business practice to bring in a job 19 that is a peer job where the people on the call have 20 no need to know it's open, and they have no vote in 21 who gets it. 22 It would have been an addition with no value, 23 and it would be counter to everything I've ever seen 24 people do in drills. You bring information into a 25 drill at the level where the folks in the discussion</p>



<p style="text-align: right;">Page 1397</p> <p>1 can make a decision.</p> <p>2 Q And the discussion with regard to that</p> <p>3 position -- the VP PSD position, for example, that</p> <p>4 would be discussed -- that level would be discussed on</p> <p>5 a different drill, right?</p> <p>6 A Right. A job at that level -- a VP level job</p> <p>7 in Joanne Collins-Smee's organization would have been</p> <p>8 discussed and viewed in the Bob Zapfel drill and</p> <p>9 potentially even in the Bob Moffat drill, which is two</p> <p>10 levels above, because it was a vice president job.</p> <p>11 That's where the discussion and decisions were</p> <p>12 happening.</p> <p>13 Q And is that the reason why it was more</p> <p>14 appropriate to put him on the Zapfel drill?</p> <p>15 A Absolutely. That was where it belonged.</p> <p>16 That's where the decision makers and the appropriate</p> <p>17 group of people to review it -- that's where they</p> <p>18 convened their 5-minute drill on.</p> <p>19 Q Because the people who chose people at that</p> <p>20 level -- that is a vice presidential level -- would</p> <p>21 not be the vice president under Joanne Collins-Smee,</p> <p>22 right?</p> <p>23 A Correct. Those would be the peers to this</p> <p>24 job. The people who should be reviewing that would be</p> <p>25 vice presidents reporting to Bob Zapfel and general</p>	<p style="text-align: right;">Page 1399</p> <p>1 that discussion.</p> <p>2 Q Now, there was some comments made about</p> <p>3 actively advocating. Did she actively advocate for</p> <p>4 him in the 5-minute drill?</p> <p>5 A She did. On occasion, she did actively</p> <p>6 advocate.</p> <p>7 MR. FASMAN: Your Honor, excuse me for</p> <p>8 one second. I have a very, very bad habit of speaking</p> <p>9 too quickly. My compatriots at my table noted that</p> <p>10 you guys were trying to take down all of the 5-minute</p> <p>11 drill numbers, and I was going too fast. I have a son</p> <p>12 who does a bunch of public speaking, and I would tell</p> <p>13 him to slow down, too. But I know where he gets it</p> <p>14 from.</p> <p>15 Let me read the numbers to you again. And</p> <p>16 I'll do it more slowly so you have that. They are</p> <p>17 Exhibits -- Defendant's Exhibits 58, 60, 67, 70, 72,</p> <p>18 78, 81, 83, 84, 90, 93, 97, 98, 101, 103, and 119.</p> <p>19 Thanks. Sorry.</p> <p>20 That's all I have, Judge.</p> <p>21 THE COURT: All right. Mr. Carta?</p> <p>22 MR. CARTA: Quickly.</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 1398</p> <p>1 managers reporting to Bob Zapfel.</p> <p>2 Q And IBM is democratic, but not that</p> <p>3 democratic, right?</p> <p>4 A Right. You don't get to vote on who's going</p> <p>5 to fill a job at your peer level.</p> <p>6 Q So the public sector -- well, I think I made</p> <p>7 the point.</p> <p>8 You started to explain, I think, in response</p> <p>9 to Mr. Carta that -- the comment that</p> <p>10 Joanne Collins-Smee rarely discussed Jim Castelluccio</p> <p>11 in her drills. Do you remember that?</p> <p>12 A Yes.</p> <p>13 Q What was your explanation that you wanted to</p> <p>14 give there?</p> <p>15 A Well, she would rarely discuss them in a</p> <p>16 drill, again, because, well, for much of the time that</p> <p>17 we were talking about, the drills we were looking at,</p> <p>18 he was assigned to another role. Then when he was on</p> <p>19 the bench, the judgment was made that he really wasn't</p> <p>20 a fit for the jobs that were being discussed and that</p> <p>21 was the call that was made.</p> <p>22 And he was on the Zapfel drill, which was</p> <p>23 giving him the sort of visibility as a key person to</p> <p>24 discuss, and I think, in at least one instance, as a</p> <p>25 candidate on the slate. That was the right forum for</p>	<p style="text-align: right;">Page 1400</p> <p>1 RE CROSS-EXAMINATION BY MR. CARTA:</p> <p>2</p> <p>3 Q Mr. Holmes, you weren't here for this, but</p> <p>4 Mr. Castelluccio testified that approximately</p> <p>5 20 percent of the jobs that were listed on</p> <p>6 Ms. Collins-Smee's 5-minute drills were also listed up</p> <p>7 on Mr. Zapfel's drills. Do you have a reason to</p> <p>8 contest that analysis?</p> <p>9 A I do not.</p> <p>10 MR. CARTA: No further questions.</p> <p>11 MR. FASMAN: One question, Your Honor.</p> <p>12</p> <p>13 REDIRECT EXAMINATION BY MR. FASMAN:</p> <p>14</p> <p>15 Q I forgot ask this. On the chart of the ages</p> <p>16 of the various --</p> <p>17 MR. CARTA: Scope.</p> <p>18 BY MR. FASMAN:</p> <p>19 Q -- representatives.</p> <p>20 MR. FASMAN: Sorry?</p> <p>21 MR. CARTA: Objection. Scope.</p> <p>22 THE COURT: I thought we were giving each</p> <p>23 other a lot of latitude on this.</p> <p>24 MR. FASMAN: It's just one question, and</p> <p>25 I forgot to ask.</p>

<p style="text-align: right;">Page 1401</p> <p>1 THE COURT: Go ahead and ask it.  2 BY MR. FASMAN:  3 Q You said that there was -- there were  4 questions about who was on that -- in the materials  5 you looked at, were those people who reported to  6 Joanne Collins-Smee in the ITD Americas position?  7 A Yes. Those were ITD Americas personnel.  8 That's my comment about people in the data set.  9 MR. FASMAN: Okay. Thank you. I'm  10 sorry, Your Honor.  11 MR. CARTA: No further questions.  12 THE COURT: Mr. Holmes, thanks so much for  13 being with us today.  14 THE WITNESS: You're welcome.  15 THE COURT: You may step down.  16 MR. FASMAN: Your Honor, IBM would call  17 Gordon Crawford to the stand.  18 THE COURT: Mr. Crawford?  19 (Gordon Crawford, sworn by the clerk)  20 THE CLERK: Please state your name, spell  21 your last name for the record.  22 THE WITNESS: Albert Gordon Crawford,  23 C-R-A-W-F-O-R-D.  24 THE CLERK: Your business address?  25 THE WITNESS: 11712 Man of War Trail,</p>	<p style="text-align: right;">Page 1403</p> <p>1 Q And when did you prepare it?  2 A I prepared this resumé as part of the  3 selection review for my consideration for the DPE  4 position at WellPoint.  5 Q So this would have been a few years ago,  6 right?  7 A That's correct.  8 Q Do you have it there, sir?  9 A Was it 186?  10 Q It's 186 in the black binders.  11 A Yes, I have it here.  12 Q Mr. Crawford, would you describe your  13 educational background after high school, sir?  14 A Yes. I attended North Carolina State  15 University in Raleigh, with a BA in history.  16 Graduated in 1969.  17 Q And were you ever in the military, sir?  18 A Yes. For those of you who have memories old  19 enough to remember, there was a small war going on at  20 the time. I was subject to the draft. I enlisted in  21 the U.S. Navy immediately upon my graduation, and  22 simultaneously made application for OCS flight school.  23 Was fortunate enough to be accepted,  24 commissioned, and made a flight officer. And  25 subsequently spent a number of years on active duty</p>
<p style="text-align: right;">Page 1402</p> <p>1 Raleigh, North Carolina, 27613.  2  3 DIRECT EXAMINATION BY MR. FASMAN:  4  5 Q Mr. Crawford, good afternoon.  6 A Good afternoon.  7 Q How are you?  8 A Fine, sir.  9 Q Thank you for coming and joining us.  10 Where do you live, Mr. Crawford?  11 A I do live at that Raleigh address.  12 Q And what year were you born, sir?  13 A 1948.  14 Q Are you currently employed?  15 A I retired from IBM on December 31st this year.  16 Q Congratulations.  17 How old were you at the time you retired?  18 A 65, on the way to 66.  19 Q So let me ask, if you would, to put up  20 Defendant's Exhibit 186, which is your resumé; and  21 it's four pages long. So maybe we won't go through  22 the whole thing, but let's start with this.  23 Is this resumé true and accurate to the best  24 of your knowledge?  25 A Yes, it is.</p>	<p style="text-align: right;">Page 1404</p> <p>1 and stayed with the Navy until retirement. Rose to  2 the rank of lieutenant commander with a specialty in  3 intelligence and particular focus on technology  4 developments in other areas of the world.  5 Q When you saw active duty, were you a fighter  6 pilot?  7 A "Back seat driver" is what we referred to it,  8 sir.  9 Q What does that mean, sir?  10 A It was officially called a radar intercept  11 officer. The guy who would give -- the guy in back in  12 the planes I was in -- there was a front-seat pilot,  13 and my responsibility was weapons delivery systems and  14 tracking targets.  15 Q And you served in active duty in Vietnam?  16 A I served in active duty on Yankee Station off  17 the coast of Vietnam.  18 THE COURT: You flew over Vietnam?  19 THE WITNESS: Yes, sir.  20 THE COURT: North Vietnam?  21 THE WITNESS: Yes, sir.  22 BY MR. FASMAN:  23 Q Mr. Crawford, can you briefly describe your  24 employment history prior to coming to IBM, sir?  25 A Yes, sir. I divide my employment history into</p>

<p style="text-align: right;">Page 1405</p> <p>1 three phases, actually. The first 14, 15 years I  2 spent as a consultant, largely doing large-scale  3 systems development for various consulting firms which  4 are listed here, specialty in manufacturing systems  5 and large-scale systems design.  6 At about the 13 year mark, I was fortunate  7 enough to land a job with a consulting firm that  8 ultimately wound up with me consulting with the  9 management consulting firm now known as Deloitte &amp;  10 Touche, but in those days, known as Touche Ross.  11 And from that position, I went with a Canadian  12 firm, Northern Telecom, headquartered in Toronto but  13 also based in my hometown of Raleigh, where I focused  14 on large-scale systems design, development of system  15 strategies, and ultimately became a member of Nortel's  16 mergers and acquisitions team as we focused on new  17 technologies that we were going to be acquiring.  18 I was at Nortel. I was a member of the team  19 that was responsible for determining whether Nortel  20 was going to outsource its computer systems to IBM or  21 one of IBM's competitors.  22 I wound up getting job offers from two of  23 those competitors, including IBM. And I joined IBM in  24 April of 1996.  25 Q And how about your career with IBM? Knowing</p>	<p style="text-align: right;">Page 1407</p> <p>1 Australia and New Zealand for two years and five  2 months.  3 Returned from Australia in April of 2013.  4 Took on another troubled-account situation to manage.  5 And my wife decided it was time for us to go to play  6 with the grandkids. Submitted my resignation and  7 retired three weeks ago.  8 Q All right, sir. Let's go back and talk about  9 the DPE at WellPoint position. I think you just said  10 that you were handling the U.K. -- is it U.K.,  11 Ireland, and South Africa?  12 A U.K., Ireland, and South Africa, yes, sir.  13 Q What was your role there?  14 A I had 80 commercial customers across the U.K.,  15 Ireland, and South Africa. We were delivering a  16 number of services out of India to those customers.  17 And I had responsibility for profit and loss,  18 operational reporting, service level attainment,  19 customer interface for those accounts.  20 Q And how was the position at WellPoint -- how  21 did the position at WellPoint first come to your  22 attention?  23 A As we discussed earlier, managing one's career  24 at IBM was a joint responsibility with hopefully your  25 mentor and yourself. My assignment in the U.K. and</p>
<p style="text-align: right;">Page 1406</p> <p>1 that IBMers tend to move around, give us a brief  2 history of your employment background with IBM.  3 A Brief history? I was hired in to run a very  4 large account deal similar to what we're referring to  5 here at WellPoint. Ultimately moved from that  6 position to taking on a role for the -- what we call  7 the Service Delivery Center South, which was the south  8 geography and a group of accounts and clients in that  9 region.  10 Was fortunate enough to be selected to  11 participate in a deal team that was working on what  12 was then the largest deal that IBM had ever done. And  13 we ultimately closed that deal, and I became the vice  14 president of delivery for IBM's relationship with  15 AT&amp;T.  16 Served in that position for a couple of years.  17 Ultimately took responsibility for IBM's e-business  18 hosting environment for all of North America. Went to  19 the U.K. in 2006 and '7 -- and that is pertinent  20 here -- to run IBM's commercial relationship with our  21 customers in the U.K., Ireland, and South Africa.  22 Was asked to come back to run the WellPoint  23 deal. And following the WellPoint deal, after two and  24 a half years at WellPoint, was offered the opportunity  25 to go back offshore and ran the IBM operations for</p>	<p style="text-align: right;">Page 1408</p> <p>1 Ireland was coming to an end -- or scheduled to come  2 to an end in January of 2008.  3 My career mentor was Mr. Bob Zapfel, whose  4 name you heard here. And in July of 2007, I contacted  5 Bob to say, "I need you to remember I'm out here. I'm  6 scheduled to come home. I do want to come home and  7 would like to be considered for roles that you see  8 appearing on the drills over the next several months."  9 Bob immediately indicated that there were  10 several positions that he could envision for me,  11 suggested that I directly contact Joanne Collins-Smee,  12 that he was aware that she had one particular account  13 that had become a bit problematic, and he thought I  14 might be a fit for that job.  15 Q Now, when you had this discussion with  16 Mr. Zapfel, did he mention who was filling the role as  17 DPE at WellPoint?  18 A No, he did not.  19 Q Did he mention WellPoint at all?  20 A Yes, he did. He mentioned WellPoint very  21 explicitly. He mentioned that it was a very  22 challenging and -- let's just say challenging account.  23 It was taking a lot of executive energy, including  24 his, and that he'd like to have someone go in and fix  25 it.</p>

<p style="text-align: right;">Page 1409</p> <p>1 Q So what did you do to follow up? Because you</p> <p>2 obviously followed up because you ended up with it.</p> <p>3 But what happened?</p> <p>4 A I did follow up with Joanne Collins-Smee and</p> <p>5 Keenie McDonald, conducted a telephone interview, and</p> <p>6 determined that it would be appropriate to have a</p> <p>7 face-to-face interview back in the U.S. We scheduled</p> <p>8 such an interview. I believe I actually had a</p> <p>9 telephone conversation with the PE, Mr. Luis</p> <p>10 Fernandez, prior to my returning to the States.</p> <p>11 I returned to the States, my recollection</p> <p>12 is -- I believe late September of 2007. Had a meeting</p> <p>13 with the senior executives at WellPoint, including</p> <p>14 Mr. Mark Boxer, who was the chief operations officer;</p> <p>15 a VP named Lori Beer, who was the head of applications</p> <p>16 development; and the VP of infrastructure services,</p> <p>17 Mr. Dave McDonald. That was, in fact, a face-to-face</p> <p>18 interview in North Haven. And subsequently we got the</p> <p>19 feedback that I had been an acceptable interview for</p> <p>20 them, and they wanted to move forward.</p> <p>21 MR. FASMAN: Let me ask if we can put</p> <p>22 Defendant's Exhibit 73 on the board, please. And</p> <p>23 let's go back to the second page, please.</p> <p>24 BY MR. FASMAN:</p> <p>25 Q Now, this is a -- this actually is a note --</p>	<p style="text-align: right;">Page 1411</p> <p>1 referred to there, is a gentleman who is one of our</p> <p>2 ombudsmen in IBM for troubled accounts. And they had</p> <p>3 asked me to make sure that I was keeping Jack apprised</p> <p>4 of any and all dialogues that were going on.</p> <p>5 Q All right. And the paragraph before that that</p> <p>6 begins with the name Mark Taylor --</p> <p>7 MR. FASMAN: Can you pull that up,</p> <p>8 please?</p> <p>9 BY MR. FASMAN:</p> <p>10 Q This talks about Mark Taylor and Bruce Russ.</p> <p>11 Who are they?</p> <p>12 A Mark Taylor was the general manager -- is the</p> <p>13 general manager for IBM Europe. He was my direct</p> <p>14 reporting boss while I was based in the U.K. and</p> <p>15 Ireland. And Bruce was the general manager for sales</p> <p>16 for U.K., Ireland, and South Africa.</p> <p>17 So it was Bruce's accounts that I was</p> <p>18 servicing and doing so under Mark. My communication</p> <p>19 here is to make sure that my immediate direct</p> <p>20 reporting boss and effectively my customer,</p> <p>21 Bruce Ross, are being kept apprised of what's</p> <p>22 happening and what a possible exit strategy is for me</p> <p>23 by the end of 2007.</p> <p>24 Q But you couldn't leave until -- they wanted</p> <p>25 you to go through the fourth quarter.</p>
<p style="text-align: right;">Page 1410</p> <p>1 an e-mail. It starts out with an e-mail from</p> <p>2 Ms. Keenie McDonald to you, correct?</p> <p>3 A That is correct.</p> <p>4 Q And it's on 9/30/2007 at 6:30 at night?</p> <p>5 A Yes.</p> <p>6 Q Does this give you a time frame for when you</p> <p>7 came over and made this trip?</p> <p>8 A Yes. My recollection is it had been a couple</p> <p>9 of days earlier. I think it was September 27th and</p> <p>10 28th that I returned.</p> <p>11 Q All right. And if we go, then, to the front</p> <p>12 page and particularly the highlighted section.</p> <p>13 A Yes.</p> <p>14 Q Why did you write this? This is you to</p> <p>15 Ms. McDonald?</p> <p>16 A That's correct. By the time we got to the</p> <p>17 States the first week in October, by the time that I</p> <p>18 had written this note or was in the process of writing</p> <p>19 this note, the feedback I had gotten was that Keenie</p> <p>20 and Joanne were prepared to move forward with my</p> <p>21 candidacy for the customer, and they wanted me to</p> <p>22 start getting involved as soon as possible.</p> <p>23 This was my commitment to them to begin making</p> <p>24 contact with Miguel Echavarria, the newly appointed VP</p> <p>25 for the sector. The gentleman, Jack Overacre, who's</p>	<p style="text-align: right;">Page 1412</p> <p>1 A They definitely wanted me to get through the</p> <p>2 fourth quarter, complete the objectives for the year.</p> <p>3 Q When were you first announced as WellPoint's</p> <p>4 DPE as the incoming?</p> <p>5 A I believe that took place in November. I</p> <p>6 don't recall the exact date. But by early to</p> <p>7 mid-November, it was acknowledged that Jim was going</p> <p>8 to be moving on and that I would be coming in</p> <p>9 effective the first of the year, first of 2008.</p> <p>10 Q When you were first announced sometime in</p> <p>11 November, did you have occasion to speak to</p> <p>12 Mr. Castelluccio?</p> <p>13 A My recollection is that it took a week to ten</p> <p>14 days or so for Jim and I to actually connect, to work</p> <p>15 out our calendars and make an arrangement to have a</p> <p>16 chat about what he had been facing and how we were</p> <p>17 going to do it. But certainly within a matter of a</p> <p>18 week to ten days, I think we had a first conversation.</p> <p>19 Q And what do you recall, if anything, about</p> <p>20 that conversation?</p> <p>21 A Jim was very forthright in his discussion of</p> <p>22 the challenges that had been being faced at WellPoint.</p> <p>23 I had the sense that he was still in the shock phase</p> <p>24 of realizing that he was being replaced. But Jim and</p> <p>25 I had worked together for a number of years, and our</p>

Page 1413	Page 1415
<p>1 commitment to each other was that it would be as 2 smooth as possible.</p> <p>3 Q Let me ask you, then, to go up and look at the 4 top of Item 73.</p> <p>5 A Okay.</p> <p>6 Q This is Ms. McDonald to you and 7 Ms. Collins-Smee?</p> <p>8 A Yes. That was a response to whether or not 9 Keenie and Joanne, either collectively or 10 individually, wanted to have a status check weekly on 11 the status of WellPoint.</p> <p>12 Q And I think on the prior one -- in fact, the 13 first one, I think Ms. McDonald says, "I'm very eager 14 to get you here and started. We need you."</p> <p>15 A That is correct.</p> <p>16 Q Did you discuss that with her?</p> <p>17 A Yes. Actually, both Keenie and Joanne 18 attempted to see if there were a way I could be 19 extricated from the U.K. prior to my target end of 20 December 31st. And Mark Taylor and Bruce Ross both 21 indicated no. He's here until the end of the year. 22 Got to get the end-of-year objectives done.</p> <p>23 Q So let me also -- let me turn to Defendant's 24 Exhibit 75, which is a series of e-mails as well from 25 Ms. McDonald to you and back and forth. Take a look</p>	<p>1 quickly and began to bring other members of the staff 2 into it. And over time, these calls turned into a 3 meeting that took place every Friday morning with 4 Boxer and McDonald.</p> <p>5 Q Dave McDonald?</p> <p>6 A Dave McDonald -- actually, Keenie McDonald 7 would be on this as well, Lori Beer, and our 8 infrastructure support teams for an hour to an hour 9 and a half.</p> <p>10 And the agenda every Friday morning was to go 11 through what took place this week; did we have a 12 significant outage or event or breakage? What did we 13 do to fix it? What the plan is going to be. And 14 this, in itself, became a part of the time pass, if 15 you will. We were doing these while I was still in 16 the U.K., and I was dialing in on U.S. outages.</p> <p>17 Q And just to make this clear, these meetings 18 continued after you were boots on the ground in the 19 United States, right?</p> <p>20 A Yes, sir.</p> <p>21 Q And they continued every Friday?</p> <p>22 A Every Friday morning.</p> <p>23 Q Okay.</p> <p>24 A Over time, after about eight to nine months, 25 we began to achieve more of our objectives and things</p>
Page 1414	Page 1416
<p>1 at that.</p> <p>2 Do you recognize that, sir?</p> <p>3 A Yes, I do, sir.</p> <p>4 Q Now, at the bottom of the page, Ms. McDonald 5 says that Dave -- and I quote, "Dave McDonald would 6 like to set up 30-minute weekly calls with you and 7 Luis."</p> <p>8 You had met -- and I presume that's 9 Luis Fernandez?</p> <p>10 A That is correct.</p> <p>11 Q And you had met Mr. McDonald?</p> <p>12 A Yes.</p> <p>13 Q What was his role again at WellPoint?</p> <p>14 A Mr. McDonald -- there were two VPs under the 15 chief operating officer, Mark Boxer. One was 16 Lori Beer, the head of applications development. The 17 other was Dave McDonald, who was the head of 18 infrastructure services.</p> <p>19 And that's tech-speak for mainframes, 20 midrange, desktops, data, all of that stuff that has 21 to work in the background. Dave was the primary 22 customer for our IBM contract.</p> <p>23 Q All right. Now, this talks about weekly 24 calls, and were those calls, in fact, set up?</p> <p>25 A Yes. Luis and I set up calls with Dave fairly</p>	<p>1 began to stabilize a bit. And at that point, 2 Mr. Boxer began to withdraw from attending those. He 3 would attend maybe every other week or every third 4 week. And it became much more what we would consider 5 in IBM our traditional operation meeting.</p> <p>6 Q Let me ask you to take a look at Defendant's 7 Exhibit 79, please. This, again, is a brief one about 8 these telephone calls.</p> <p>9 Do you recognize this, sir?</p> <p>10 A Yes, I do.</p> <p>11 Q Take your time.</p> <p>12 A Yes, I recognize this.</p> <p>13 Q Are these the same calls with McDonald and 14 Lori Beer and Fernandez that you mentioned a few 15 moments ago?</p> <p>16 A What was happening here, we were having the 17 standing Friday meetings, but Dave McDonald had 18 actually asked for perhaps another meeting, a separate 19 30-minute meeting, to make sure that we were digging 20 deep into some of the technical issues. And yes, we 21 did have those calls set up as well.</p> <p>22 Q This says -- this is from Ms. McDonald to 23 Fernandez and you, and it says, "Mark continues to be 24 very disappointed in our delivery leadership."</p> <p>25 Did she explain -- did you ever discuss that</p>



<p style="text-align: right;">Page 1417</p> <p>1 with her?</p> <p>2 A Yes. During the November, December time frame</p> <p>3 of 2007, the WellPoint account had a couple of fairly</p> <p>4 significant outages. One involved database corruption</p> <p>5 and took an extremely long period of time to rebuild</p> <p>6 and recover from. And Mr. Boxer and Mr. McDonald were</p> <p>7 convinced that IBM could have and should have done a</p> <p>8 better, faster job in getting them back up in</p> <p>9 operation. And that -- I think that was the proximate</p> <p>10 cause for this.</p> <p>11 Q Okay. So when did you start on WellPoint</p> <p>12 full-time?</p> <p>13 A January 3rd, 2008.</p> <p>14 Q Now, was Mr. Castelluccio still working on the</p> <p>15 account when you took over as DPE?</p> <p>16 A Jim was, yes, working in the background,</p> <p>17 helping me with the transition. There had been a</p> <p>18 report, an audit report, done in the fourth quarter of</p> <p>19 2007. And there were a number of operational issues</p> <p>20 identified as part of those -- that operations report</p> <p>21 of things that needed to be corrected. And Jim was</p> <p>22 actively engaged in working with and actually helping</p> <p>23 me get my hands around those and helping us get those</p> <p>24 resolved.</p> <p>25 Q And did you, in fact, meet with him on one or</p>	<p style="text-align: right;">Page 1419</p> <p>1 you -- did you read the various Red Team Reviews and</p> <p>2 the audits and all that stuff?</p> <p>3 A Yes, I did.</p> <p>4 Q Now, how many times did you communicate with</p> <p>5 Mr. Castelluccio at or about this time in terms of the</p> <p>6 transition?</p> <p>7 A I would say our transition conversations</p> <p>8 numbered in six to eight conference calls,</p> <p>9 conversations around specific topics over a period of</p> <p>10 about six to eight weeks.</p> <p>11 Q Now, can you describe the state of affairs on</p> <p>12 the WellPoint account when you took over?</p> <p>13 Let me see if I can ask you to take a look at</p> <p>14 Plaintiff's Exhibit number 19.</p> <p>15 MR. FASMAN: Can you put that up for a</p> <p>16 moment? It's up.</p> <p>17 BY MR. FASMAN:</p> <p>18 Q Let me make this easy for you.</p> <p>19 A Okay. Thank you.</p> <p>20 Q Do you recognize that?</p> <p>21 A I believe this document was passed to me as</p> <p>22 part of the hand-off of Beer's -- the history on the</p> <p>23 account. I do not have any recollection of having</p> <p>24 reviewed this or discussed this in detail with Jim or</p> <p>25 Mark or Jack Overacre.</p>
<p style="text-align: right;">Page 1418</p> <p>1 more occasions to discuss those issues?</p> <p>2 A My recollection is that our conversations took</p> <p>3 place by telephone. I do not recall a face-to-face</p> <p>4 with Jim during that period of time.</p> <p>5 Q During that period of time when you were</p> <p>6 speaking to him, did he attempt to give you a</p> <p>7 blueprint of what he thought needed to be done on the</p> <p>8 WellPoint account?</p> <p>9 A I'm hesitating because of the word "blueprint."</p> <p>10 Q Try Red Team Review. Try any of those IBM</p> <p>11 terms.</p> <p>12 A Jim had a great deal of knowledge of things</p> <p>13 that needed to be addressed, not only those that had</p> <p>14 been identified by the Red Team Review, the audit</p> <p>15 review, but his own particular perceptions of what the</p> <p>16 weak spots were in the account and things that needed</p> <p>17 to be addressed.</p> <p>18 Q Did he share with you -- there was a document</p> <p>19 that's been referred to in this trial multiple times,</p> <p>20 a Red Team -- or an overall plan from 2006.</p> <p>21 A 2006?</p> <p>22 MR. FASMAN: Can you see if you can find</p> <p>23 that for us?</p> <p>24 BY MR. FASMAN:</p> <p>25 Q I'll continue questioning, but I'll see if</p>	<p style="text-align: right;">Page 1420</p> <p>1 Q All right. Let me ask you -- let me go back</p> <p>2 to the more general question that I asked you, which</p> <p>3 was: What was the state of affairs on the WellPoint</p> <p>4 account when you took over in 2008?</p> <p>5 A By any characterization that I'm used to in</p> <p>6 managing our IBM accounts worldwide, it was classified</p> <p>7 as a troubled account.</p> <p>8 Q And what were -- and I take it, as DPE, you</p> <p>9 were supposed to do what you could to fix that?</p> <p>10 A Yes, sir.</p> <p>11 Q So let me ask you about various different</p> <p>12 areas in which we've heard testimony about.</p> <p>13 What's a Crit Sit or a SWAT call? What are</p> <p>14 those?</p> <p>15 A Critical -- Crit Sit is a critical situation.</p> <p>16 We typically call those when a customer has a banking</p> <p>17 system, or Qantas's airline reservation system, or</p> <p>18 some such thing as that, goes out, the customer's</p> <p>19 business is impacted.</p> <p>20 IBM is providing that service in that</p> <p>21 business. It's up to team IBM and the customer to get</p> <p>22 that business back in operation. So Crit Sits are our</p> <p>23 most intense moments of fixing things.</p> <p>24 Q Did you make any changes with regard to how</p> <p>25 Crit Sit calls were handled when you came in as DPE?</p>



<p style="text-align: right;">Page 1421</p> <p>1 A Yes, sir. The Friday morning meetings with 2 Boxer, McDonald, and Beer would typically start with 3 the focus on Crit Sits that had occurred in the last 4 week. And WellPoint had a policy. 5 They had a very sophisticated IT organization, 6 a very knowledgeable organization. And 7 Mr. Dave McDonald had a series of SWAT calls; that is, 8 open communication call lines, open at all times, 24 9 hours a day. That number varied somewhere between six 10 and ten open phone lines at any hour of the day. If a 11 Crit Sit was called, if there was an outage, the 12 WellPoint executives, the IBM executives would get a 13 page: SWAT-5, this number, be there in 15 minutes. 14 One of the things that we had to do to 15 demonstrate to the customer that we were taking those 16 Crit Sits seriously was get faster at our responses in 17 mobilizing the team. So in the first week in January, 18 normally a person who runs an account in this fashion, 19 as a standard DPE policy would be, if it's a Crit Sit, 20 wake me up. Let me know. You guys handle it. That's 21 the way that -- wake me up at the two-hour mark. 22 My direction to my team and to them was I 23 wanted every member of my team on that call at the 24 30-minute mark. No matter what hour of the day or 25 night, I wanted to be paged. I wanted them to be</p>	<p style="text-align: right;">Page 1423</p> <p>1 change that goes into the environment, and 2 particularly in the unanticipated change. In this 3 account there were record-setting numbers of the 4 amount of change taking place. 5 Q What do you mean by that? 6 A 3,400 changes per month was the average in 7 2007 and 2008. 8 Q And what do you mean by "changes"? Tell the 9 jury what you're talking about. 10 A I need to have a new disk drive installed on 11 my Dell computer here, or I need to reconfigure the 12 network for the mainframe to bring in access to 13 another environment or another situation. 14 The problem that WellPoint, in my view, was 15 suffering from was a lack of discipline in those 16 changes such that, even with the extraordinarily high 17 volumes, 25 percent of those volumes were going in on 18 Friday afternoons with emergency changes not reviewed 19 by the management teams, not reviewed in a way that 20 would allow you to understand what this was going to 21 do to your neighbor and your neighbor's neighbor in 22 the environment. So step number one was to analyze 23 and determine what was causing the changes -- basic 24 Pareto diagrams. 25 And then we put in a two-phase approach to a</p>
<p style="text-align: right;">Page 1422</p> <p>1 paged. And we would be on the SWAT calls, because the 2 customer was going to be on the SWAT calls, and their 3 expectation was we would be as well. 4 Q So you were on all of those calls? 5 A Yes, sir. 6 Q How were your sleep patterns during that time? 7 A As I've indicated to some folks, one of the 8 things I was not prepared for was the physical demands 9 that this account represented. It was quite frequent 10 that we would have two or three simultaneous SWAT 11 calls going at all hours of the day or night. From 12 January 3rd to Easter 2008, I personally did not have 13 three consecutive nights of sleep without being on an 14 all-nighter. So that's neither here nor there, but 15 it's -- it was the intensity of the account. 16 Q So I presume that didn't -- that situation 17 didn't continue. 18 Did you make any process changes to alleviate 19 that situation? And if you did, tell the jury what 20 you did. 21 A I made two fundamental changes; one 22 organizationally, and one process. 23 Without too much detail, one of the things 24 that can cause the wheels to come off in an account 25 such as any of the ones that we run is the amount of</p>	<p style="text-align: right;">Page 1424</p> <p>1 change advisory board. Instead of doing a board on 2 the Friday morning and rubber-stamping all of these 3 changes going in, we began to have a review on 4 Tuesdays and a review on Fridays. And subsequently, 5 over time, we got that to be the Tuesday and Friday 6 reviews were not for this week, but for the week out. 7 So we were communicating better to all of the 8 customer constituents what was going to happen, what 9 the potential impact was, and making sure that all 10 hands were on deck if and when that change went 11 through. 12 The second key change that I made -- as we had 13 done the analytics on what was causing our problems, 14 we determined that data, the disk drives, where the 15 data resides was the big problem area where we were 16 having outages. We had the mainframe team managing 17 their data and their data groups. We had the unit's 18 midrange teams managing their data and their data 19 pools. 20 Unfortunately, in a company like this, those 21 data pools cross, clash, cross speed; and I was 22 fortunate enough to be able to go and get a very 23 skilled resource who I named as the head of all data 24 with particular focus on data change. 25 Q And this is -- when you say a "skilled</p>

<p style="text-align: right;">Page 1425</p> <p>1 resource," an executive?</p> <p>2 A This was a Band 10 data expert out of one of</p> <p>3 IBM's other accounts. I knew this individual, and I</p> <p>4 handpicked -- drafted him for the job.</p> <p>5 Q And so what was he able to do? How did his</p> <p>6 coming in change things?</p> <p>7 A This was a longer road. The gentleman's name</p> <p>8 was Mike Favetta. Mike set out on a path to begin to</p> <p>9 change and meld those mainframe and midrange data</p> <p>10 sources together and did so over about an 8- to</p> <p>11 12-month period.</p> <p>12 The combination of reduced critical changes,</p> <p>13 reduced urgent changes, and stabilization in the data</p> <p>14 environment managed to significantly improve our</p> <p>15 service-level agreements, what we call SLAs, and</p> <p>16 significantly reduce our penalties paid to the</p> <p>17 customer in 2008.</p> <p>18 Q Now, we've heard from various folks that the</p> <p>19 fix for WellPoint was adding hundreds of bodies. Did</p> <p>20 you add hundreds of bodies?</p> <p>21 A No, sir.</p> <p>22 Q Aside from the storage executive, did you add</p> <p>23 anybody, any bodies?</p> <p>24 A We would add bodies as necessary to backfill</p> <p>25 bodies that were leaving or might be going to another</p>	<p style="text-align: right;">Page 1427</p> <p>1 year, we had achieved a point of satisfaction where</p> <p>2 the customer agreed with us that there were some</p> <p>3 pieces of the contract that were working and some that</p> <p>4 were not and that it was going to be in WellPoint's</p> <p>5 best interest and IBM's best interest to begin a</p> <p>6 renegotiation and redefinition of the contract.</p> <p>7 Q And, in fact, that's 2009?</p> <p>8 A Yes, that was 2009.</p> <p>9 Q And, in fact, the WellPoint-IBM contract was</p> <p>10 renegotiated in 2009, wasn't it?</p> <p>11 A Yes, sir. 2009, 2010.</p> <p>12 Q And were you involved?</p> <p>13 A Yes, sir.</p> <p>14 Q And did IBM's relationship with WellPoint</p> <p>15 expand as a result of this contract?</p> <p>16 A Yes, it did. As we began to be more</p> <p>17 successful in the day-to-day operations, we began to</p> <p>18 have more opportunity to discuss next opportunities.</p> <p>19 At that time, computer analytics or analysis</p> <p>20 of what's going on in the medical profession -- drug</p> <p>21 interactions, treatment options -- we began to have</p> <p>22 some significant conversations at the highest level</p> <p>23 with WellPoint about what IBM might do there, as well.</p> <p>24 For those of you who have followed our</p> <p>25 product, Watson, on Jeopardy and those things,</p>
<p style="text-align: right;">Page 1426</p> <p>1 account, but we did not have a wholesale go hire 20,</p> <p>2 go hire 50, go hire 150.</p> <p>3 Q How did your team function as time went on?</p> <p>4 What types of things happened with your WellPoint</p> <p>5 team?</p> <p>6 A Well, I think one of the things that happened</p> <p>7 was -- my personal opinion was we became cohesive.</p> <p>8 There's nothing like making sure that everybody's on a</p> <p>9 call at 3 a.m. in the morning and that the boss is</p> <p>10 going to be there and they're going to be there. A</p> <p>11 few of those would kind of increase the intensity</p> <p>12 level.</p> <p>13 Q Cure you or kill you, huh?</p> <p>14 A It had an effect of inculcating the intensity</p> <p>15 that was going to be required to be successful here,</p> <p>16 and I think we got there. I had four very, very</p> <p>17 strong individuals who stepped up to the plate and</p> <p>18 drove that success.</p> <p>19 Q And how about customer satisfaction? What</p> <p>20 happened with the customer? Let's say in the first</p> <p>21 year or so that you were WellPoint DPE, what happened?</p> <p>22 A It improved marginally in the first six</p> <p>23 months. They were in the "wait and see, show me"</p> <p>24 mode. By the end of the first year, we were seeing</p> <p>25 significant improvements. By the end of the second</p>	<p style="text-align: right;">Page 1428</p> <p>1 WellPoint became the first place where we were able to</p> <p>2 actively propose Watson as a technology for medical</p> <p>3 diagnostics.</p> <p>4 Q You better tell everybody what Watson is.</p> <p>5 A I'm sorry. For those who do not know, Watson</p> <p>6 was an R&amp;D development by IBM's research labs where we</p> <p>7 taught the computer to think. We taught the computer</p> <p>8 to play Jeopardy. We made Jeopardy in, I think it was</p> <p>9 2012, nationally televised broadcast with three prior</p> <p>10 Jeopardy grand slam winners and one big blue computer</p> <p>11 doing -- translating the language of the question and</p> <p>12 then beating the best in class. It was a</p> <p>13 demonstration on how you teach a computer to think and</p> <p>14 analyze and understand the human voice in all of its</p> <p>15 contexts.</p> <p>16 The way WellPoint wanted to use it was as an</p> <p>17 interface to doctors and researchers to say, Gordon</p> <p>18 has a polyp on his left elbow, he suffered a fracture</p> <p>19 there three years ago, what are the most likely</p> <p>20 scenarios for what that could mean, and to use it in</p> <p>21 medical diagnostics.</p> <p>22 Q And did that, in fact, happen?</p> <p>23 A Yes.</p> <p>24 Q Is there -- are you familiar with something</p> <p>25 called the Chairman's Award?</p>

Page 1429	Page 1431
<p>1 A Yes, sir.</p> <p>2 Q And tell the jury what that is, please.</p> <p>3 A The chairman -- former chairman instituted a</p> <p>4 Chairman's Award for the team that achieved -- that</p> <p>5 achieves the best results in customer service and</p> <p>6 dramatic turnaround, the overall best of IBM for what</p> <p>7 we do.</p> <p>8 Q And did WellPoint win that in one year?</p> <p>9 A Yes, sir.</p> <p>10 Q What year, sir?</p> <p>11 A I believe that was 2010.</p> <p>12 Q Let me ask you just one more series of</p> <p>13 questions.</p> <p>14 Did you attend a kickoff meeting for the</p> <p>15 delivery operation in early 2007 at Disney World?</p> <p>16 A Yes, sir.</p> <p>17 Q What was the purpose of the meeting?</p> <p>18 A In those days, when we could afford it, we</p> <p>19 would typically have an annual kickoff session. And</p> <p>20 in 2007 -- in December of 2006, it was announced that</p> <p>21 IBM's global service delivery organization was going</p> <p>22 to be reporting to the worldwide general manager for</p> <p>23 manufacturing, a gentleman named Bob Moffat.</p> <p>24 Mr. Moffat called for a kickoff session for our IBM</p> <p>25 global services team -- two and a half days, as I</p>	<p>1 delivery were shocked, surprised. Some were even more</p> <p>2 stunned. But it was -- it represented a dramatic</p> <p>3 departure and dramatic turn in where our delivery</p> <p>4 direction was going to be going.</p> <p>5 Q And what was the nature of the change in how</p> <p>6 delivery was supposed to operate as explained at this</p> <p>7 meeting?</p> <p>8 A I would characterize our operations prior to</p> <p>9 2007 as the DPE, first and foremost, was to take care</p> <p>10 of his or her customer, assured the customer</p> <p>11 satisfaction, meet your financial goals and</p> <p>12 objectives, but assure delivery.</p> <p>13 The message that came at us in the 2007</p> <p>14 announcements was that you are going to continue to be</p> <p>15 focused on delivery assurance, but we're on a forced</p> <p>16 march for cost take out and operational efficiency,</p> <p>17 and you are going to be expected to do more with less.</p> <p>18 Q And without getting into attorney-client</p> <p>19 privileged conversations, you explained that to me</p> <p>20 earlier in Navy terms and I thought that was</p> <p>21 particularly useful. You want to tell the jury what</p> <p>22 you said?</p> <p>23 A Well, as I indicated, in some accounts -- in</p> <p>24 some leadership of various accounts, it's typical to</p> <p>25 say, in order to do more, I need more resources. I</p>
Page 1430	Page 1432
<p>1 recall, at Disney World, end of January.</p> <p>2 Q Not too bad.</p> <p>3 A Not too bad.</p> <p>4 Q How many people were in attendance?</p> <p>5 A Approximately 400, maybe a few more.</p> <p>6 Q During the meeting, do you recall discussion</p> <p>7 of the continued employment of Mr. Jones,</p> <p>8 Kelton Jones, and Tony Macina?</p> <p>9 A Yes, sir. There was a very dramatic moment at</p> <p>10 the kickoff meeting. Unanticipated, I think, by</p> <p>11 probably everyone in the room, perhaps save two, that</p> <p>12 Mr. Macina, who had served for a number of years as</p> <p>13 our worldwide general manager, and Mr. Jones, whom I</p> <p>14 think the court has met, were going to be replaced and</p> <p>15 that there would be a new regime taking place.</p> <p>16 Mr. Bob Zapfel, whose name you have heard, was</p> <p>17 introduced to the team as the new worldwide leader</p> <p>18 for -- Mr. Moffat was the worldwide leader.</p> <p>19 Mr. Zapfel was going to be the North American leader,</p> <p>20 and fundamentally that there was going to be a change</p> <p>21 in direction in the global service delivery</p> <p>22 operations.</p> <p>23 Q And what was your reaction when you heard</p> <p>24 this?</p> <p>25 A I think most of us who had spent many years in</p>	<p>1 need more people.</p> <p>2 In the Navy roles that I've had, both</p> <p>3 shipboard and airborne, the commander of the</p> <p>4 particular forces that I worked for tells me how many</p> <p>5 people I get. That's how many people you get to run</p> <p>6 your boat. You figure it out.</p> <p>7 And I think the interpretation that I had of</p> <p>8 what was going to be required for not only WellPoint,</p> <p>9 but any move going forward, was I've been dealt a hand</p> <p>10 of cards. I've been dealt 480 people. I'm not going</p> <p>11 to get 580 people or even, you know, X number more.</p> <p>12 I've got to figure out what I'm going to do with the</p> <p>13 hand I've been dealt.</p> <p>14 Q And is that consistent with what you did at</p> <p>15 WellPoint?</p> <p>16 A Yes, sir.</p> <p>17 MR. FASMAN: Mr. Crawford, I have no</p> <p>18 further questions. Thank you for coming up here in a</p> <p>19 snowstorm yesterday.</p> <p>20 THE WITNESS: Yes, sir.</p> <p>21 THE COURT: Mr. Carta, will you be</p> <p>22 examining the witness?</p> <p>23 MR. CARTA: I will, Your Honor, yes.</p> <p>24 THE COURT: Well, I notice it's 20 after</p> <p>25 3. Would you like to take a break until 3:30?</p>

<p style="text-align: right;">Page 1433</p> <p>1 THE JURORS: Yes.</p> <p>2 THE COURT: I'm going to stay here to</p> <p>3 make sure I'm here when everyone else is here.</p> <p>4 (Jurors excused)</p> <p>5 THE COURT: Mr. Crawford, you may step</p> <p>6 down. Watch the first step.</p> <p>7 THE WITNESS: Will do.</p> <p>8 (Recess taken from 3:23 p.m. to 3:34 p.m.)</p> <p>9 THE COURT: Please be seated, ladies and</p> <p>10 gentleman.</p> <p>11 Mr. Carta, you were about to begin your</p> <p>12 examination.</p> <p>13 MR. CARTA: Thank you, Your Honor. This</p> <p>14 will be very short.</p> <p>15</p> <p>16 CROSS-EXAMINATION BY MR. CARTA:</p> <p>17</p> <p>18 Q Good afternoon, Mr. Crawford.</p> <p>19 A Good afternoon, sir.</p> <p>20 Q As I believe you know, I represent</p> <p>21 Mr. Castelluccio.</p> <p>22 A Right.</p> <p>23 Q I just want to spend five minutes, just making</p> <p>24 sure that I've understood everything that you've said.</p> <p>25 Mr. Castelluccio, fully cooperative with you</p>	<p style="text-align: right;">Page 1435</p> <p>1 Q And he shared with you what insights he had</p> <p>2 and what suggestions he could propose in terms of</p> <p>3 continuing to improve the situation at WellPoint.</p> <p>4 A We spent most of the time discussing the</p> <p>5 challenges that he had faced. We didn't spend -- my</p> <p>6 recollection is we didn't spend a lot of time talking</p> <p>7 about the plans going forward.</p> <p>8 Q And I think you said that the baton pass, to</p> <p>9 use your analogy, was as smooth as possible. Is that</p> <p>10 a fair assessment?</p> <p>11 A Yes, sir.</p> <p>12 Q You've also talked about the situation that</p> <p>13 you found yourself in when you first took over the</p> <p>14 account. And I think you said that it took a good six</p> <p>15 months for the customer satisfaction situation to</p> <p>16 start to change?</p> <p>17 A Yes, sir.</p> <p>18 Q And I think you were touting a Mike Fabia --</p> <p>19 A Favetta.</p> <p>20 Q Thank you -- as having done a superb job of</p> <p>21 melding something. You were too technical for me</p> <p>22 there. What was he melding?</p> <p>23 A Mike was responsible for taking our data</p> <p>24 strategy -- our disk hardware and our database</p> <p>25 management systems -- which previously had been run by</p>
<p style="text-align: right;">Page 1434</p> <p>1 when you came in to take over the WellPoint DPE</p> <p>2 position in terms of transitioning the business to</p> <p>3 you?</p> <p>4 A Absolutely.</p> <p>5 Q And he provided you with whatever</p> <p>6 documentation you asked for, and he had some plans</p> <p>7 that he presented to you that he said were the plans</p> <p>8 that he was using to try to turn the account around.</p> <p>9 MR. FASMAN: Your Honor, that's like</p> <p>10 three questions.</p> <p>11 THE COURT: I think the witness is pretty</p> <p>12 sharp and...</p> <p>13 MR. FASMAN: Sharp or not, I thought you</p> <p>14 were supposed to answer one at a time.</p> <p>15 THE COURT: He's a fighter jet pilot. I</p> <p>16 think he can answer three questions.</p> <p>17 THE WITNESS: Yes. Jim provided me the</p> <p>18 input that he had on the audit reports that had been</p> <p>19 completed in the fourth quarter and the action items</p> <p>20 associated with that. And we discussed the history of</p> <p>21 the account in 2007 and the challenges he had faced.</p> <p>22 BY MR. CARTA:</p> <p>23 Q And you found him, I think you said,</p> <p>24 knowledgeable about the problems at WellPoint?</p> <p>25 A Yes, sir.</p>	<p style="text-align: right;">Page 1436</p> <p>1 two separate and distinct groups -- effectively,</p> <p>2 logically pulling those apart and creating a mechanism</p> <p>3 by which the mainframe people could get access to the</p> <p>4 data that they needed. The midrange could get access</p> <p>5 to the data that they needed and that we could grow</p> <p>6 that data environment in a way so it would not</p> <p>7 negatively impact either one of those groups and</p> <p>8 therefore create change problems.</p> <p>9 Q And, Mr. Crawford, I think I heard you say</p> <p>10 that, even a skilled person like Favetta took, I think</p> <p>11 you said eight to nine months to effectuate those</p> <p>12 changes, is that right?</p> <p>13 A That's correct.</p> <p>14 Q So would you agree with me that there were no</p> <p>15 quick fixes on the WellPoint account?</p> <p>16 A No, sir. I would not agree with you on that.</p> <p>17 There were a couple of things that were relatively</p> <p>18 quick fixes.</p> <p>19 The reduction conviction of the customer --</p> <p>20 communication to the customer to change their change</p> <p>21 process and their volume of change and their</p> <p>22 discipline around change, in my estimation, was our</p> <p>23 first big win. And that came within probably six</p> <p>24 weeks.</p> <p>25 Q And that was -- I'm not sure I understand you.</p>

<p style="text-align: right;">Page 1437</p> <p>1 Let me see -- and that was a change that the customer 2 needed to make? 3 A Yes, actually. It was a combination of 4 changes that the customer and IBM needed to make. The 5 change advisory board that I alluded to was one that 6 consisted of customer technical representatives, their 7 IT organization, customer business representatives, 8 the pharmaceutical teams, the insurance processing 9 teams, and the IBM teams that were responsible for 10 technology to all come together to understand this is 11 what we're going to do on this change this weekend, 12 forward. 13 It's going involve you. Mr. Carta, it's going 14 to involve you. It's going to involve this person and 15 this person, and you could potentially be impacted. 16 So let's get all of that out on the table so that we 17 know if something goes casters up -- our term -- at 18 3 a.m. in the morning, we need to call a SWAT call. 19 This is what we're going to be doing. 20 Q So that was one thing that you implemented -- 21 were able to implement immediately? 22 A Yes, sir. 23 Q And the other things, as you've said, took 24 some period of time to change, isn't that right? 25 A That's correct.</p>	<p style="text-align: right;">Page 1439</p> <p>1 responsibility? 2 A That is correct. 3 MR. CARTA: No further questions. 4 MR. FASMAN: Your Honor, I don't have any 5 further questions. Thank you. 6 THE COURT: Well, thank you very much, 7 Mr. Crawford. 8 THE WITNESS: Thank you, sir. 9 THE COURT: You may step down. 10 MR. FASMAN: Your Honor, IBM calls to the 11 stand Russell Mandel. 12 THE COURT: Mr. Mandel, please come 13 forward. 14 (Russell Mandel, sworn by the clerk) 15 THE CLERK: Please state your name, and 16 spell your last name for the record. 17 THE WITNESS: Hello. My name is 18 Russell Mandel, and my last name is spelled 19 M-A-N-D-E-L. 20 THE CLERK: Your business address? 21 THE WITNESS: 150 Kettletown Road, 22 Southbury, Connecticut. 23 24 25</p>
<p style="text-align: right;">Page 1438</p> <p>1 Q In July of 2007, wasn't there something else 2 that happened? Didn't Mark Boxer leave WellPoint? 3 A No, sir. I believe Mr. Boxer left in -- at 4 the end of the first quarter of 2009, I think. To my 5 recollection, Mr. Boxer was there as the chief 6 operating officer when I took over, and I didn't start 7 until January 2008. 8 My recollection was he had a three-quarter or 9 possibly four-quarter tenure. And then he missed some 10 fairly significant numbers for the corporation and was 11 asked to leave. I can't give you a specific date, but 12 I do believe it was post-2008. 13 Q So sometime after that, Mr. Boxer left? 14 A That is correct. 15 Q And I believe you testified that, from January 16 2007, when you first were working on the account 17 full-time. 18 A 2008. 19 Q I'm sorry, 2008 -- through Easter of 2008, 20 that you did not get three consecutive full nights of 21 sleep, is that right? 22 A That's correct. 23 Q And am I correct that, during that time 24 period, beginning in January through Easter of 2008, 25 that the WellPoint assignment as DPE was your entire</p>	<p style="text-align: right;">Page 1440</p> <p>1 DIRECT EXAMINATION BY MR. FASMAN: 2 3 Q Mr. Mandel, good afternoon. How are you? 4 A Fine, thank you. 5 Q Good. 6 You are employed by IBM? 7 A Yes. 8 Q Tell the jury your current title, sir. 9 A I'm the program director for the Global 10 Concerns &amp; Appeals Program. 11 Q Can you talk into the microphone. 12 What was that again? 13 A I'm the global program director for concerns 14 and appeals. 15 Q We'll talk about that in a minute. 16 How long have you worked for IBM? 17 A Thirty-seven years. 18 Q And how old are you? 19 A I'm 68. 20 Q Can you briefly summarize your -- let's start 21 with your educational background after high school. 22 Can you tell the jury about your educational 23 background, please? 24 A Certainly. I got a bachelor's of science 25 degree from City College. From there, I got an MBA</p>



Page 1441	Page 1443
<p>1 from Baruch College. Then I went to NYU, where I got  2 an additional masters and a Ph.D. in industrial  3 organization.  4 Q Now, can you summarize your job history prior  5 to IBM, sir?  6 A When I first got out of college, I taught for  7 four years at a grammar school. Then I had a -- then  8 I started going back full-time, which means I had a  9 variety of different part-time jobs, including  10 teaching assistant and getting grants and that kind of  11 stuff and did some consulting as well.  12 Q How did you come to IBM? How did you come to  13 be employed by IBM originally, is what I meant to say?  14 A I heard about an opportunity at IBM, and so I  15 applied for the job.  16 Q And can you summarize briefly -- briefly  17 because, of course, every IBMer has multiple jobs --  18 but briefly, give the jury an idea of what your career  19 path has been at IBM.  20 A Sure. When I first started, for the first six  21 years, I did customer satisfaction, market research,  22 and competitive analysis for IBM. Then I went on a  23 two-year chair assignment to the corporate  24 headquarters organization to do personnel research.  25 When I left that, I joined the business</p>	<p>1 Concerns &amp; Appeals Program, right?  2 A Yes.  3 Q And that's the official title?  4 A Yes.  5 MR. FASMAN: Can we put up the first page  6 of -- this is Defendant's Exhibit 109.  7 BY MR. FASMAN:  8 Q And that is the program you were talking  9 about, sir?  10 A Yes.  11 Q This is 11 pages long, and it is single  12 spaced. And it's 10 until 4; so we're not going do  13 that. But let me ask you generally about this, and  14 certainly the jurors can look at this.  15 MR. FASMAN: You can look at this when it  16 gets to your notebooks if you're so inclined.  17 BY MR. FASMAN:  18 Q The booklet here, IBM U.S.'s Concerns &amp;  19 Appeals Program, is this made available to employees?  20 A Yes.  21 Q And what's the overall purpose?  22 Well, let me ask you this: There are a  23 several different internal appeals processes.  24 A Yes.  25 Q And can you tell the jury what those are?</p>
Page 1442	Page 1444
<p>1 systems side of the organization. That was people  2 that were going to be moving to Southbury. They were  3 located in two different locations: one in Norwalk,  4 one in Westchester.  5 And I started off as the employee relations  6 diversity manager for the first two, two and a half  7 years. And then in the last two and a half years, I  8 was the HR manager for the site.  9 After that, the next 15 years, I was the -- I  10 became the ER advisor for the various configurations  11 that we had at IBM global services.  12 Q What do you mean by "ER"?  13 A Employee relations.  14 Q Thank you.  15 A Its various iterations, and part of that  16 responsibility was both doing the open doors during  17 those 15 years and coordinating open doors.  18 Supervising people doing that is really what  19 coordination is all about.  20 Then I went on to be a program manager at  21 the -- in the Corporate Concerns &amp; Appeals Program.  22 That was until October -- I think November of 2008, in  23 which I was -- I became then the program director  24 position, which I currently hold.  25 Q All right. The concerns -- you call it the</p>	<p>1 There's three major ones.  2 A Certainly. There's the Open Door, there's  3 Panel Review, and there's another program called  4 Confidentially Speaking.  5 Q All right. We're going to talk about the Open  6 Door.  7 Can you tell the jury and tell the Court, just  8 generally speaking, what the other two are?  9 A Certainly. The Confidentially Speaking  10 program provides an opportunity for employees to make  11 comment and ask questions about a variety of different  12 IBM policies and practices. It also provides an  13 opportunity for them to bring forward complaints or  14 bring forward issues that are violations by IBM  15 misconduct guidelines.  16 The Panel Review looks into decisions made by  17 management. It's basically a panel made up of  18 managers and non-managers in terms of assessing  19 whether or not the person was treated fairly by the  20 manager mentioned.  21 Q And the panel-review process -- is that  22 available to executives?  23 A No, it is not.  24 Q How does that work, by the way? How does the  25 panel-review process work? What happens?</p>

<p style="text-align: right;">Page 1445</p> <p>1 A The panel is made up of -- assuming it's a  2 non-manager employee -- is made up of three  3 non-managers and two managers. In terms of  4 preparation of their presentations, both the employee  5 who's making the complaint and the manager they are  6 making the complaint about prepare a presentation to  7 the panel. And the -- and there's a coordinator in HR  8 who actually coordinates these -- this activity.  9 There's also a certain number of witnesses  10 that are called to speak in front of the panel. And  11 eventually there's a vote on the panel, and it  12 basically is a majority rules content.  13 Q And they have the authority to take action?  14 A They have the opportunity. What they really  15 do is they decide whether or not he was treated  16 fairly. Any disciplinary action that might occur  17 afterwards would occur based on the HR person running  18 it.  19 Q Okay. Let's go and talk about the open-door  20 process, which is on pages 5 and 6 of this document.  21 MR. FASMAN: Maybe we could put up  22 page 5, please.  23 BY MR. FASMAN:  24 Q Mr. Mandel, speaking generally, what's the  25 purpose -- why does IBM have an open-door process at</p>	<p style="text-align: right;">Page 1447</p> <p>1 A Yes.  2 Q Have you ever served as an open-door  3 investigator?  4 A Yes.  5 Q How many times during the course of your  6 career?  7 A Hundreds.  8 Q And how are investigators selected for a  9 particular open door, sir?  10 A Currently investigators are a part of the case  11 management team. And so right now, the way they're  12 being done is, depending on the strategy of the  13 person, people are selected to do them are employees.  14 In terms of executive open doors, they're done by  15 myself. I actually also do open doors brought by  16 human resources people as well.  17 Q And what's the role of the investigator, just  18 generally speaking?  19 A To basically look into and find -- do an  20 impartial, fair investigation into whether or not the  21 employee was treated fairly in a specific instance.  22 If we find that they were treated unfairly, to rectify  23 those situations; if we find management error, to put  24 in place disciplinary actions.  25 Q In your current position, do you review the</p>
<p style="text-align: right;">Page 1446</p> <p>1 all?  2 A Well, at the very least, to make sure that  3 managers operate in a legal -- in an appropriate legal  4 framework, but also to go beyond and make sure that  5 they're acting in a fair and equitable manner in  6 actions taken with employees.  7 Q And does the open-door process address  8 employment discrimination?  9 A Yes.  10 Q In what fashion, sir?  11 A We investigate individual examples of  12 discrimination provided by the employee.  13 Q Who can begin an open-door investigation?  14 A Any employee and also former employees within  15 90 days of their leaving the company.  16 Q And is there a time limit within which you  17 have to file an open-door complaint?  18 A The same 90 days.  19 Q And is there a typical length of how long it  20 takes to do an investigation?  21 A Generally, they take on the average between 30  22 and 60 business days.  23 Q Now, turning over to page 6. Section 2.6 of  24 this document discusses the role of an investigator of  25 an open door. Are you familiar with this?</p>	<p style="text-align: right;">Page 1448</p> <p>1 work of other open-door investigators?  2 A Yes, I do.  3 Q And would you explain to the jury and the  4 Court how that works?  5 A Two different ways. The first way is that if  6 an employee is dissatisfied with the investigation  7 that was done by one of the case managers, there's a  8 final review point. And those are brought so they can  9 bring it forward eventually to myself, and I will  10 review the previous investigation.  11 The other way is, around the world as we do  12 those, I try to do some auditing. And I do  13 spot-checking of the individual investigations and  14 review the reports that were done to make sure that  15 I -- that we're actually following our own processes  16 and being fair to the employees being investigated in  17 terms of investigations.  18 Q So you're the -- are you the point of appeal  19 if someone doesn't like how an open door comes out?  20 A Yes.  21 Q And is there any further appeal from you?  22 A No.  23 Q Okay. Section 2.7, if we could highlight that  24 portion, describes the investigation in general terms,  25 correct?</p>

<p style="text-align: right;">Page 1449</p> <p>1 Why don't you tell us what generally is an  2 investigator expected to do? When the investigation  3 begins, what happens?  4 A The first step is normally to speak with the  5 employee, and that's usually followed immediately by  6 speaking with the manager involved.  7 Q And then what happens?  8 A And then based on that, the person proceeds  9 with an investigation: interviewing people, reviewing  10 documents, and other material.  11 Q Who was responsible for interviewing  12 Mr. Castelluccio's complaint?  13 A Me.  14 Q You were.  15 MR. FASMAN: And let me ask if we could  16 put up Defendant's Exhibit 122, please.  17 BY MR. FASMAN:  18 Q Would you rather have that in hard copy?  19 A It wouldn't hurt my feelings. I'm a little  20 challenged on the eyes here, yes.  21 Q The hard copy should be in the black notebook.  22 We're looking at number 122. You have two of those,  23 of course. Take your time.  24 A Thank you.  25 Q Do you have that, sir?</p>	<p style="text-align: right;">Page 1451</p> <p>1 it was the 23rd.  2 Q Now, during the -- do you remember that  3 meeting with him?  4 A Vaguely.  5 Q During the initial interview with  6 Mr. Castelluccio, did he state that the first words  7 out of Ms. Collins-Smee's mouth when she first met him  8 were "How old"?  9 A No.  10 Q Are you certain of that?  11 A Yes.  12 Q Did you make notes of that meeting?  13 A Yes, I did.  14 Q And did you, at my request, review those  15 notes?  16 A Yes, I did.  17 Q Did they reflect such a comment by  18 Mr. Castelluccio to you?  19 A No.  20 Q Did you review the report that you prepared,  21 sir?  22 A Yes, I did.  23 Q And does your report contain any reference to  24 such a comment being related to you by Mr. Castelluccio?  25 A No, it does not.</p>
<p style="text-align: right;">Page 1450</p> <p>1 A Yes, I do.  2 Q Now, this is -- let me ask you to identify it  3 for the jury and for the Court.  4 A This is a note stream between  5 Jim Castelluccio, Garrett Walker, Garrett to myself,  6 and my forwarding it to Kristen Moran.  7 Q And so I believe the back page, page 2, is a  8 complaint that Mr. Castelluccio forwards to Mr. Walker  9 and then Mr. Walker forwards to you, sir?  10 A Yes.  11 Q Who's Kristen Moran, by the way?  12 A She was my assistant at the time.  13 Q And you tell her, "Please set up 30 minutes  14 with Jim next week, and put this in a red file"?  15 A Yes.  16 Q What does that mean?  17 A Basically, I wanted to meet with Jim to hear  18 his side of the complaint. And the red file is how I  19 identify open doors in my file folders so I know which  20 ones are the open doors.  21 Q And did you, in fact, meet with  22 Mr. Castelluccio?  23 A Yes, I did.  24 Q And when was this, sir?  25 A I believe it was the following week. I think</p>	<p style="text-align: right;">Page 1452</p> <p>1 Q If he had said something like that, would that  2 have come to your attention?  3 A Yes.  4 Q All right. What was the nature of the  5 complaint that Mr. Castelluccio related to you when  6 you spoke to him?  7 A Essentially, he said that he was  8 constructively discharged as a result of age  9 discrimination. And he provided me general examples  10 of that, one of which had to do with his performance  11 assessment. Associated with that was his removal from  12 the two jobs.  13 His second example was that Joanne  14 Collins-Smee was insufficiently active in helping him  15 find another position; and thirdly, she asked at one  16 point whether or not he was old enough to retire.  17 Q And did he say that -- this was one time that  18 he was old enough to retire?  19 A Yes.  20 Q Now, I don't want you to get into what your  21 conclusions were in any way, shape, or form, but I do  22 want to know how many people you interviewed during  23 the process of conducting this open-door investigation.  24 A Including Jim, 21.  25 Q Twenty-one people during what period of time,</p>

<p style="text-align: right;">Page 1453</p> <p>1 sir?</p> <p>2 A The investigation -- I did over, about -- from</p> <p>3 a calendar perspective, about a month and a half,</p> <p>4 maybe five weeks, something in that area.</p> <p>5 Q All right. During the investigation, did you</p> <p>6 receive any information with regard to employee</p> <p>7 placement; that is, Ms. Collins-Smee's efforts to</p> <p>8 place Mr. Castelluccio in a different position?</p> <p>9 A Yes, I did.</p> <p>10 Q So I think we've seen some of these.</p> <p>11 MR. FASMAN: But let me ask</p> <p>12 Ms. Gutierrez, could you put up number 124?</p> <p>13 MR. CARTA: Defendant's 124.</p> <p>14 THE WITNESS: I can refer to that in the</p> <p>15 book. The printing there is a little small.</p> <p>16 BY MR. FASMAN:</p> <p>17 Q Yes. Of course. Go ahead.</p> <p>18 Can you tell us what this is, sir?</p> <p>19 A I'm looking through it. Hold on.</p> <p>20 Q Okay. Take your time.</p> <p>21 A It's a note stream between Connie Murphy and</p> <p>22 Jack Overacre and eventually sent to me by Connie.</p> <p>23 Q And the first e-mail there by Ms. Murphy on</p> <p>24 the back page --</p> <p>25 A Yes.</p>	<p style="text-align: right;">Page 1455</p> <p>1 A The date of that is April 1st, 2008.</p> <p>2 Q All right. Now, I think we've seen the other</p> <p>3 two, but I may as well -- we may as well note these --</p> <p>4 135.</p> <p>5 A Yes, I see it.</p> <p>6 Q Can you tell us what this one is, sir?</p> <p>7 A Yes. This is a -- Joanne Collins-Smee, again,</p> <p>8 quoting Jim's resumé to Liz Smith in this case,</p> <p>9 indicating that Jim is available for a new position</p> <p>10 and wondering if she had -- Liz had any executive</p> <p>11 positions open, either a Band D or a C position, that</p> <p>12 might be a match for Jim's skills. And Liz responds</p> <p>13 back. Seems to be that she does not. She's actually</p> <p>14 cutting back on execs on her team.</p> <p>15 Q This is a set of e-mails, though, that was</p> <p>16 forwarded to you as part of your investigation?</p> <p>17 A Yes, it was.</p> <p>18 Q And who forwards it to you?</p> <p>19 A Garrett Walker.</p> <p>20 Q Let's take a look at 136, as well, please.</p> <p>21 A Sure. I have it.</p> <p>22 Q And this also was forwarded to you by</p> <p>23 Mr. Walker?</p> <p>24 A Yes, it was.</p> <p>25 Q And what is this one, sir?</p>
<p style="text-align: right;">Page 1454</p> <p>1 Q -- is dated 5/14/2008, isn't it?</p> <p>2 A Yes, it is.</p> <p>3 Q And can you summarize it for the jury?</p> <p>4 A Yes. It basically says that this is notes</p> <p>5 from the Zapfel 5-minute drill on a position that Jack</p> <p>6 had open. And it says that Joanne Collins-Smee asked</p> <p>7 that Jim had been interviewed by Jack. So that's</p> <p>8 pretty much a summary of it.</p> <p>9 Q And then the remaining portions of this are</p> <p>10 various e-mails back and forth about what happened?</p> <p>11 A Yes.</p> <p>12 Q All right.</p> <p>13 MR. FASMAN: Let me ask, Jean, would you</p> <p>14 put up Defendant's 128, please?</p> <p>15 BY MR. FASMAN:</p> <p>16 Q Do you have that there, sir?</p> <p>17 A Yes, I do.</p> <p>18 Q Maybe you can read it over and tell the jury</p> <p>19 what this one is.</p> <p>20 A Connie forwarding a resumé -- Jim</p> <p>21 Castelluccio's resumé, indicating that Jim is</p> <p>22 available for positions, and Joanne Collins-Smee</p> <p>23 recommends him as a candidate for your open director</p> <p>24 slot, and it's written to Bill Barnett.</p> <p>25 Q And what's the date?</p>	<p style="text-align: right;">Page 1456</p> <p>1 A This is Joanne Collins-Smee forwarding Jim's</p> <p>2 resumé to Mark Hennessy, who is the chief division</p> <p>3 officer for IBM at the time, indicating, again, that</p> <p>4 he's one of her team members, and he's available for</p> <p>5 new positions and, again, says, "I was wondering if</p> <p>6 you had any executive openings in the C or D level in</p> <p>7 CIO's office that might be a match for Jim."</p> <p>8 Q All right. So let's talk about more generally</p> <p>9 rather than on these specific things. If it took you</p> <p>10 six to eight weeks to finish this investigation and it</p> <p>11 was begun in mid-June, it was not done by the time</p> <p>12 Mr. Castelluccio ended up leaving IBM, correct?</p> <p>13 A Yes.</p> <p>14 Q So did you communicate with anyone about what</p> <p>15 happens in that situation?</p> <p>16 A Yes, I did.</p> <p>17 Q And with whom did you communicate and what did</p> <p>18 you tell them?</p> <p>19 A I communicated with Keith Holmes, Jim, and</p> <p>20 Joanne Collins-Smee.</p> <p>21 Q And what did you tell them?</p> <p>22 A Essentially --</p> <p>23 MR. CARTA: Objection, Your Honor. What</p> <p>24 did he tell them?</p> <p>25 MR. FASMAN: Yes.</p>

<p style="text-align: right;">Page 1457</p> <p>1 THE COURT: I'm sorry, Mr. Carta.  2 MR. CARTA: Yeah. I'm not sure about  3 "What did he tell them." That's an awfully open-ended  4 question under the circumstances.  5 THE COURT: Can you narrow it down?  6 BY MR. FASMAN:  7 Q Yes. What did you tell them about the  8 situation with Mr. Castelluccio apparently leaving on  9 June 30th, and you, then, at some subsequent time,  10 concluding your investigation?  11 MR. CARTA: I'm going to object.  12 MR. FASMAN: Just limit it to that.  13 MR. CARTA: I'm going to keep my  14 objection, Your Honor.  15 THE COURT: Are we getting on to thin ice  16 now?  17 MR. FASMAN: No.  18 THE COURT: Are you sure?  19 MR. FASMAN: Yes.  20 THE COURT: Okay. The objection's  21 overruled.  22 BY MR. FASMAN:  23 Q Just what -- let me put it this way: Why  24 don't you tell us what you told them about that set of  25 circumstances, with him leaving and you continuing to</p>	<p style="text-align: right;">Page 1459</p> <p>1 five minutes so this can be read back to me, because  2 apparently there's some legal question that is  3 implicated here. So would you just hold on for five  4 or ten minutes or so, please?  5 (Jurors excused)  6 THE COURT: I'm going to ask you, would  7 you please read back Mr. Fasman's last question and  8 the witness's answer?  9 (Question and answer read back by reporter.)  10 MR. CARTA: Your Honor, "If I did not  11 find in his favor, then we would bring him back."  12 THE COURT: That's it. That's just  13 exactly what -- I mean, he told you the results of his  14 investigation.  15 MR. CARTA: Exactly.  16 MR. FASMAN: I'm sorry?  17 THE COURT: You told, through this  18 witness -- this witness testified as to the results of  19 his investigation.  20 MR. FASMAN: I don't think he did. He  21 didn't testify at all.  22 THE COURT: Stop. Mr. Castelluccio is no  23 longer working for IBM.  24 MR. FASMAN: Correct.  25 THE COURT: He was not brought back --</p>
<p style="text-align: right;">Page 1458</p> <p>1 investigate, without revealing anything about your  2 findings at all?  3 A Certainly. If I found that in Jim's favor, we  4 would bring him back to the business; and if not, he  5 would -- the package that he had been offered would  6 still be available to him, because the last date that  7 the package would be available would have been June  8 30th. And it wouldn't be fair for him not to have  9 that package available to him; so therefore, he would  10 have 48 hours to review the package if I did not find  11 in his favor.  12 Q However, in your long career --  13 MR. CARTA: I'm going to move to strike.  14 I think that that was more than thin ice.  15 THE COURT: Mr. Fasman?  16 MR. FASMAN: I don't think it was. It's  17 a very basic concept. He didn't finish his  18 investigation and that's --  19 THE COURT: You want me to have that read  20 back, Mr. Carta?  21 MR. CARTA: No. I think everybody heard  22 it.  23 THE COURT: Well, I think everybody heard  24 it but me. The witness was facing away from me and  25 the microphone. Let's ask the jury to excuse us for</p>	<p style="text-align: right;">Page 1460</p> <p>1 MR. FASMAN: Correct.  2 THE COURT: -- to IBM. The witness  3 testified that, if the investigation turned out to be  4 meritorious, Mr. Castelluccio would be brought back to  5 IBM. He's not back at IBM; ergo, this gentleman found  6 that it was a non-meritorious claim, which is exactly  7 what we all agreed was not going to be done. It's not  8 going to be brought to the jury's attention.  9 MR. FASMAN: I thought that what I was  10 saying was did you have the power to reinstate him.  11 That's all I wanted to get on the record.  12 THE COURT: You didn't ask him that. You  13 asked him what you asked him, and he answered what he  14 answered. And Mr. Castelluccio's non-employment by  15 IBM is the necessary conclusion of the witness's  16 testimony. The investigation found that it was not  17 meritorious.  18 MR. FASMAN: Then, Your Honor, I suppose  19 you should strike all of this.  20 THE COURT: Well, I'm going to ask the  21 jury to disregard. The problem with my asking the  22 jury to disregard the fact that Mr. Castelluccio's no  23 longer with IBM is worse than asking the jury to  24 disregard Mr. Mandel's testimony that Mr. Castelluccio  25 would be invited back in the event Mr. Mandel's</p>



<p style="text-align: right;">Page 1461</p> <p>1 investigation was substantiated or actually  2 substantiated Mr. Castelluccio's complaint.  3 So do you have more that you want to go  4 into with this witness?  5 MR. FASMAN: Not really. I mean, what I  6 would -- the only other questions I had were: How do  7 you normally communicate the results of an  8 investigation? Did you communicate the results with  9 Mr. Castelluccio, period. Two more questions.  10 THE COURT: All right. Well, you know, I  11 don't think that this is really harmful. I mean, it  12 would be better if it weren't said, because it would  13 be clearly in keeping with an agreement.  14 I don't believe that Mr. Fasman  15 intentionally has sabotaged our agreement. I believe  16 it was just one of these things that came out. I  17 don't think it was emphasized to the jury. I don't  18 think the jury picked up on it.  19 I think more harm would be done by my  20 going into detail about this testimony. But I think  21 you should just conclude with this witness. The  22 question is, how do we conclude with this witness  23 without making it obvious.  24 Mr. Carta, any ideas?  25 MR. CARTA: I'm sorry, Your Honor?</p>	<p style="text-align: right;">Page 1463</p> <p>1 results, Your Honor, just makes me anxious.  2 THE COURT: You know something? I can  3 see why.  4 You conducted the investigation. Thank  5 you very -- you conducted the investigation because  6 you had a procedure. You conducted the investigation  7 because you take claims of this nature seriously.  8 MR. CARTA: I don't have a problem with  9 that as a final question.  10 MR. FASMAN: Fine.  11 THE COURT: Okay. That's what we're  12 going to do.  13 MR. CARTA: I'm not in any way waiving  14 whatever rights I may have by virtue of the question.  15 I have my own feelings about whether it was  16 intentional or not.  17 THE COURT: Okay.  18 MR. CARTA: Well, we filed a motion.  19 We've had three sidebars. I raised the question after  20 the question was asked. I mean, I could not have done  21 anything more to prevent this very thing from  22 happening.  23 MR. FASMAN: Your Honor, it certainly was  24 not intentional. It was only meant to do the  25 following, that is, to say that IBM takes this</p>
<p style="text-align: right;">Page 1462</p> <p>1 THE COURT: Any ideas?  2 MR. CARTA: Well, first of all, Your  3 Honor, I'm going to request that, at minimum, a charge  4 that testimony about any internal investigation and  5 the results of any internal investigation should not  6 weigh on the jury's decision. It's their  7 responsibility and opportunity to find facts  8 themselves. I think, at minimum, we would be entitled  9 to that.  10 THE COURT: Well, you are and you'll get  11 that.  12 MR. FASMAN: And we have no objection to  13 that.  14 THE COURT: Okay. You are and you will  15 get that.  16 And, Michael, take down Mr. Carta's  17 words. We'll make sure that any charge at the  18 appropriate space.  19 What I propose to do is bring the jury  20 back in, and then ask Mr. Mandel: So you conducted an  21 internal investigation? And he's going to say yes.  22 And were you satisfied with the results of the  23 investigation?  24 MR. FASMAN: Fine.  25 MR. CARTA: I think any reference to</p>	<p style="text-align: right;">Page 1464</p> <p>1 seriously. And they empower him to bring people back,  2 to reinstate people. He has the power to do it.  3 And if I did something wrong, it  4 certainly was not intentional. I was very clear. I  5 said I do not want you to reveal anything about the  6 conclusion of your investigation. I was very clear  7 about that.  8 THE COURT: Well, it was also part of the  9 agreement that the jury was not going to be told that  10 this gentleman had the power to bring him back,  11 because that indicates that, by his not exercising  12 that power and by Mr. Castelluccio no longer being at  13 IBM, Mr. Mandel found that it wasn't necessary to  14 exercise that power because the allegations were not  15 meritorious.  16 Now, listen, this is what I'm going to  17 do. I'm going to tell the jury that we've had some  18 legal talk, and I'm going to say, I just want to ask  19 you a couple questions, Mr. Mandel. You conducted an  20 investigation, and you conducted it because IBM takes  21 these allegations of this nature seriously. Yes.  22 Thank you very much.  23 MR. FASMAN: Fine.  24 THE COURT: He's going to step down.  25 Now, Mr. Carta, it was not my intention</p>

Page 1465	Page 1467
<p>1 to deprive you of your right to an opportunity to 2 argue that Mr. Fasman intentionally sandbagged you. 3 It was not my intention to deprive you of the power to 4 make any argument that you want to make in that 5 regard. And I know that you'll do what you believe is 6 the right thing to do.</p> <p>7 And now I've got to do what I believe is 8 the right thing to do. I was here. I heard it, and I 9 don't think it was any big deal to the jury what they 10 heard. It wasn't put across in a way to really call 11 dramatic attention to it, part one. And part two, I 12 do not believe that Mr. Fasman sandbagged 13 intentionally you or the Court. You're free to argue 14 otherwise, but this is just my belief.</p> <p>15 MR. FASMAN: Judge, if I may say so in my 16 own defense, I've been trying cases for 40 years. 17 I've always protected the record. I've always tried 18 to make sure that I complied with every order from 19 every judge that I've ever gotten, and this is 20 certainly one of those.</p> <p>21 If I thought that Your Honor was going to 22 have this reaction to what I couched as a simple 23 question, which is -- I didn't realize that this was 24 going to transgress on our agreements. Mr. Carta 25 knows that there are documents in the file.</p>	<p>1 testimony and you just -- and the testimony was just 2 limited to your question that -- which is that he had 3 an investigation, he conducted the investigation, and 4 the reason he conducted the investigation was that he 5 wanted to make a good-faith effort to determine 6 whether there had been age discrimination.</p> <p>7 That's what they -- that's the proof that 8 they have been sort of dancing around, which is to 9 show that there was no willfulness.</p> <p>10 THE COURT: Well, that's okay. But then 11 I'm making it my question, and I could very easily 12 botch the question. I don't want to do that. I don't 13 want to be the cause of any consternation on the part 14 of either the Plaintiff or IBM.</p> <p>15 We'll handle it, and you do what you have 16 to do after consulting with Mr. Castelluccio? Mr. 17 Castelluccio, I'm sorry, sir.</p> <p>18 (Jurors present)</p> <p>19 THE COURT: Gentleman and ladies, welcome 20 back in. Please sit down.</p> <p>21 We had some legal argument, and there was 22 some question about the Court's prior rulings, and I 23 think the best way to handle this is the way I'm going 24 to handle this. I'm going to handle it this way.</p> <p>25 Mr. Mandel, I can't believe you're older</p>
Page 1466	Page 1468
<p>1 THE COURT: You really aren't talking 2 about my reaction, you're talking about Mr. Carta's 3 reaction.</p> <p>4 MR. FASMAN: Well, either one.</p> <p>5 THE COURT: Wait a minute. Somebody 6 reading the words could think that this is a situation 7 where a judge is acting or behaving in a 8 disproportionate manner or acting angrily or is 9 reproving you, which I'm not doing.</p> <p>10 MR. FASMAN: Okay, I'm sorry. I'll take 11 my foot out of my mouth. I seem to be putting it 12 there frequently this afternoon.</p> <p>13 THE COURT: I'll agree with you on that.</p> <p>14 MR. FASMAN: I didn't mean to imply 15 otherwise.</p> <p>16 THE COURT: Let's get the jury in. And 17 then we'll take care of it.</p> <p>18 Mark, you do what you got to do.</p> <p>19 MR. CARTA: Well, I clearly can't do 20 anything without consulting with my client, and I need 21 to do that.</p> <p>22 THE COURT: Okay.</p> <p>23 MR. CARTA: Your Honor, before the jury 24 comes in, there is one suggestion of Ms. Triolo I want 25 to ask the Court. What if we struck all of his</p>	<p>1 than I am.</p> <p>2 THE WITNESS: Thank you.</p> <p>3 THE COURT: I mean that's dark hair.</p> <p>4 Okay. We'll get on to the matter at 5 hand.</p> <p>6 It's your job at IBM to investigate 7 allegations of this nature, correct?</p> <p>8 THE WITNESS: Yes.</p> <p>9 THE COURT: And you did that. You 10 conducted an investigation.</p> <p>11 THE WITNESS: Yes.</p> <p>12 THE COURT: And you and IBM conduct 13 investigations like that -- like this one because you 14 know and believe that the law with respect to 15 discrimination is important, serious, and it should be 16 obeyed.</p> <p>17 THE WITNESS: Yes.</p> <p>18 THE COURT: All right. I don't think the 19 Court has any more questions.</p> <p>20 MR. FASMAN: I have no further questions 21 for this witness.</p> <p>22 THE COURT: Mr. Carta?</p> <p>23 MR. CARTA: I have no questions of this 24 witness. Thank you, Your Honor.</p> <p>25 THE COURT: Thank you so much for being</p>

<p style="text-align: right;">Page 1469</p> <p>1 here, sir. It's only zero out.  2 THE WITNESS: Okay.  3 MR. FASMAN: Your Honor, we have one more  4 witness who unfortunately is coming from Long Island  5 and who got snowed in last night. What we do have,  6 though, are deposition designations that the parties  7 have agreed upon to be read into the record. And if  8 we have half an hour, we can probably put those in so  9 the jury can have them before them.  10 THE COURT: Will your witness be able to  11 be here tomorrow?  12 MR. FASMAN: First thing in the morning,  13 yes.  14 THE COURT: Mr. Carta?  15 MR. CARTA: That's perfectly all right,  16 Your Honor.  17 THE COURT: Tomorrow?  18 MR. CARTA: Yes.  19 THE COURT: Who's the witness?  20 MR. FASMAN: It's Charles Sodikoff, who's  21 an expert on recruiting.  22 THE COURT: Okay.  23 MR. FASMAN: He should be very brief and  24 then we'll be done.  25 THE COURT: Okay. So this is what's</p>	<p style="text-align: right;">Page 1471</p> <p>1 And once counsel have reviewed the  2 exhibits and are in agreement as to which ones should  3 be sent into the jury room or how many should be sent  4 into the jury room, we will do that. And after the  5 jury is charged and has the exhibits, it will begin  6 deliberating. And I think that's the itinerary for  7 tomorrow. Okay?  8 All right. Ladies and gentlemen, my  9 gosh, two days in a row I'm getting to let you go  10 early.  11 MR. CARTA: No, Your Honor. We were  12 going to read those excerpts.  13 THE COURT: You wanted to?  14 MR. FASMAN: Yes, I think so. Right?  15 Yes.  16 THE COURT: You wanted to read the  17 excerpts in lieu of having the person come in  18 tomorrow?  19 MR. CARTA: No.  20 MR. FASMAN: No. We wanted to read, Your  21 Honor -- we agreed that there were certain  22 depositions -- portions of depositions that we thought  23 were relevant for the jury, but we didn't want to have  24 another six or eight witnesses. So we've cut out and  25 agreed upon a series of deposition excerpts that were</p>
<p style="text-align: right;">Page 1470</p> <p>1 going to happen tomorrow.  2 Are you going to put on a rebuttal case,  3 Mr. Carta?  4 MR. CARTA: No.  5 THE COURT: We're going to have this  6 gentleman testify in person. After he testifies,  7 we'll have a break during which we'll have a charging  8 conference with me and the law clerks and Wendy in my  9 library and you'll be given a copy of the charge  10 tonight.  11 MR. CARTA: Thank you.  12 MR. FASMAN: Thank you.  13 THE COURT: And I want you to look it  14 over, not for stylistic changes, but I want to make  15 sure that the law -- correct law is in there, and it's  16 correctly stated, and it's stated in a way that makes  17 it easiest for the jury to understand it and apply it  18 to the facts that they find.  19 After the charge conference, we're going  20 to come back and there will be closing arguments. And  21 as is the custom in this district, Mr. Carta will go  22 first. Mr. Fasman will then give his closing  23 argument, and Mr. Carta will then have a rebuttal  24 opportunity.  25 Then I'm going to deliver the charge.</p>	<p style="text-align: right;">Page 1472</p> <p>1 taken in this case -- sworn testimony taken in this  2 case that we agreed between us ought to be read to the  3 jury.  4 MR. CARTA: That's correct.  5 MR. FASMAN: And we would propose right  6 now that we read them, question, answer, question,  7 answer. And the actors, I gather, in this drama are  8 my partner, Mr. Duffield, and Ms. Triolo, depending on  9 the gender of the person who's answering and asking  10 the questions. So if that's okay.  11 THE COURT: Yes, that's fine with me. I  12 was thinking we were talking about reading those in  13 lieu of having the witness come here.  14 MR. FASMAN: No. We'll have our live  15 witness here tomorrow morning first thing.  16 THE COURT: All right. So we get to hear  17 some reading. How do you want to do this? Do you  18 want to have your --  19 MS. TRIOLO: The stand? You're going to  20 have to --  21 THE COURT: Somebody will be doing  22 reading from the witness stand. Make sure I  23 understand -- I know the jury will understand. Make  24 sure I understand who this is, and who you are  25 reading.</p>

<p style="text-align: right;">Page 1473</p> <p>1 MR. DUFFIELD: Certainly. All right.  2 The role of Barbara Brickmeier will be played by  3 Ms. Triolo, and I will be playing the role of  4 Mr. Fasman, the younger version -- much younger  5 version.  6 I don't know if it's helpful for the  7 record for us to read the pages or just to run through  8 the testimony. How do you usually like this done?  9 THE COURT: I usually don't like this at  10 all. But question and answer, whichever way you  11 prefer.  12 MR. DUFFIELD: So we're going to start on  13 page 9.  14 MS. TRIOLO: Yes.  15 MR. DUFFIELD: All right.  16 (Deposition testimony read)  17 Q "Where did you graduate from high school?  18 A "Oceanside High -- Oceanside High School.  19 Q "And what did you do upon graduation?  20 A "I went to school at Long Island University.  21 Q "Did you graduate from Long Island University?  22 A "Yes, I did.  23 Q "What year?  24 A "1977.  25 Q "With what degree, if any?</p>	<p style="text-align: right;">Page 1475</p> <p>1 A "My specific job is I'm responsible for HR for  2 that business unit globally. My primary client is an  3 SVP.  4 Q "What's an SVP?  5 A "A senior vice president.  6 Q "Who specifically?  7 A "His name is Timothy Shaughnessy.  8 Q "Can you describe in detail what your  9 responsibilities are in that position?  10 A "I provided advice to Mr. Shaughnessy on all  11 HR-related matters for the business unit that he is  12 responsible for. And I have some direct reports who  13 also report direct reports into Mr. Shaughnessy. My  14 ultimate responsibility is for all HR-related matters  15 for that business unit. All employees worldwide, I am  16 responsible for the HR.  17 Q "Do any written policies or procedures exist  18 for reassigning executive-level employees?  19 A "No.  20 Q "Are there standard practices that have been  21 in place -- that are in place?  22 A "There are approaches that are in place, and  23 practices that could vary depending on the business  24 unit.  25 Q "With respect to the current practices, can</p>
<p style="text-align: right;">Page 1474</p> <p>1 A "Bachelor's degree in English.  2 Q "Did you pursue any formal education beyond  3 that?  4 A "Yes.  5 Q "What?  6 A "I went to graduate school and obtained an  7 MBA -- Masters of Business Administration.  8 Q "Where did you get your MBA?  9 A "Adelphi University.  10 Q "Where is that?  11 A "Long Island.  12 Q "What year did you graduate from Adelphi with  13 your MBA?  14 A "I'm not a hundred percent certain, because I  15 went nights. I believe it was 1982, give or take a  16 year or so.  17 Q "So currently what's your official title?  18 A "My official title is vice president services  19 delivery and HR delivery.  20 Q "You said that you are vice president services  21 delivery and HR delivery. Delivery for whom?  22 A "Services delivery -- it's the business unit  23 called Global Technology Services, and there's a  24 delivery component at that business unit.  25 Q "You provide HR services for your customers?</p>	<p style="text-align: right;">Page 1476</p> <p>1 you give me a summary of what current practices are in  2 place for assisting an employee -- an executive-level  3 employee to find a new position within IBM?  4 A "Well, when executives are available for jobs,  5 their names typically and commonly would be on drills.  6 And a 'drill' is a periodic process where we look at  7 jobs that are open and employees who might be  8 available. And then those employees are discussed for  9 suitability for their roles.  10 "And this would be employees who are available  11 because they don't have a current position or  12 employees who have this skill and expertise and  13 experience who might already have a position.  14 Q "You're talking about the 5-minute drill  15 process?  16 A "That's right.  17 Q "When did you first become involved in the  18 5-minute drill process?  19 A "In April of 2008, in my current job.  20 Q "Specifically, what is your involvement since  21 that time? What has been your involvement?  22 A "I am responsible for the 5-minute drill for  23 Tim Shaughnessy.  24 Q "At what level, if there's a general  25 procedure, does someone run their own 5-minute drill?</p>

<p style="text-align: right;">Page 1477</p> <p>1 A "My manager or executive can run a 5-minute 2 drill. Our policy is for executives -- all executives 3 to run drills to fill their positions. Anybody below 4 an executive does not have to. It's up to them 5 whether they want to fill jobs that way. 6 Q "When you say executive, what does that 7 include? What levels? 8 A "It correlates to a banding structure, and 9 it's Band D and above. 10 Q "And do executives run their 5-minute drills 11 in a uniform way? 12 A "Executives typically run it in a uniform way, 13 because there's a prescribed way to do it. 14 Q "What's the prescribed way to do that? 15 A "That, depending upon the type of jobs that 16 executive determines are appropriate for their drill, 17 then whatever time the drill is -- I'm sorry -- 18 whatever the time period is for the drill -- typically 19 they're every four weeks, but it could vary. 20 "The direct reports to that executive would 21 submit in advance the jobs that they have open or 22 anticipate having open. And they would also -- if 23 they have a slate of candidates that they have a 24 preferred candidate, that would be presented. In some 25 cases, there are no candidates and it's open for</p>	<p style="text-align: right;">Page 1479</p> <p>1 A "These are the top ones that come to my mind. 2 Q "Do you know anything about the history of the 3 5-minute drills? When they first started to become a 4 matter of standard procedure? 5 A "I do not know the exact date when they 6 started, but they've been in existence for a very long 7 time. 8 Q "By 'very long time,' do you mean three years? 9 a decade? What you mean by 'very long time'? 10 A "I joined IBM in 1996, and my recollection is 11 that they would have been around even at that time, 12 but I cannot say with certainty. But they've been 13 around a long time. 14 Q "Do you know when they became regular in ITD 15 Americas group? 16 A "I cannot say. 17 Q "Do you know if in 2007, 2008, Joanne 18 Collins-Smee was running a 5-minute drill? 19 A "I have no personal knowledge of that. 20 Q "But Mr. Moffat was for some period of time? 21 A "Yes. 22 Q "And Mr. Zapfel was? 23 A "I have no recollection. My assumption is 24 that he would because it's standard practice. 25 Q "I want to just ask a couple of questions</p>
<p style="text-align: right;">Page 1478</p> <p>1 discussion. And that's what's discussed at the 2 meeting. 3 Q "Okay. What other steps or procedures are 4 available to, let's say, a general manager in addition 5 to the use of a 5-minute drill to assist an executive 6 to relocate or find a new assignment? 7 A "For the general manager to assist somebody? 8 Q "Uh-huh. 9 A "If the employee who is looking for a job 10 wants to or desires to ask for assistance in finding a 11 job, then the general manager can agree to do that. 12 Q "If the general manager agrees to do that, 13 what steps are available to a general manager for 14 assisting an executive to find a new position? 15 A "A general manager or any employee could agree 16 to let that employee who's looking for a job know of 17 any opportunities that come up. That general manager 18 could agree to put the employee on a 5-minute drill as 19 somebody who's looking for an assignment or could 20 agree to serve as a reference for that employee, when 21 that employee interviews for a job and would like to 22 call upon the general manager to provide personal 23 experience. 24 Q "Anything else that a general manager can do 25 to assist an executive to find a new position?</p>	<p style="text-align: right;">Page 1480</p> <p>1 about a person in a Band C role. A person such as 2 Mr. Castelluccio who is in a Band C role in the ITD 3 Delivery division who was looking for a job, what 4 5-minute drills would you expect to have him appear 5 on? 6 A "My expectation is that he would appear on 7 managers' 5-minute drills. 8 Q "That would be Joanne Collins-Smee? 9 A "Joanne Collins-Smee, as a person who is 10 looking for a position at a Band C level. It would be 11 very typical for her to present that at her boss's 12 5-minute drill. 13 "At that time, I believe her boss was 14 Bob Zapfel. It's even possible that Bob could have 15 presented that on Moffat's drill, but I'm not sure. 16 Q "But the one you think would be most likely 17 would be Joanne Smee's own 5-minute drill? 18 A "Yes. 19 Q "Why is that? Why do you think that would be 20 the typical one for him to appear on? 21 A "Because the protocol and the process is that 22 executive positions which we need to fill and people 23 who could be candidates for these jobs or any job, 24 whether they were unassigned and they were personally 25 looking for the next assignment, that those names</p>



Page 1481	Page 1483
<p>1 would be presented as people to discuss or people  2 looking for jobs. This is typical protocol  3 particularly for a Band C executive.  4 Q "At what point in this process would you  5 expect Mr. Castelluccio to be listed on the 5-minute  6 drill?  7 A "In general, people can -- executives can be  8 put on the 5-minute drill for a variety of reasons.  9 Either we know they're going to come off an assignment  10 and we're thinking ahead -- this could a temporary  11 role.  12 Q "What could be a temporary role?  13 A "This type of position.  14 Q "I'm not sure what you're referring to.  15 A "Just generically, you asked me a question  16 about people being on the 5-minute drill. And jobs  17 could be on the drill if we anticipate needing someone  18 to fill a particular job for a variety of reasons, or  19 individual names of executives could be on the  20 5-minute drill as we need to place this person.  21 "And we could put it on now anticipating a  22 placement in six months; or we could put it on now  23 because we anticipate a placement in four weeks; or we  24 could put it on because it's a temporary job, and we  25 know it's going to be having a beginning and an end</p>	<p>1 productive reason for them to be on the drill  2 anymore -- because there's no expression of interest  3 and no jobs that are coming up.  4 Q "In your experience, why has there been some  5 occasions when there was a delay of a month or two, I  6 think you said?  7 A "Again, just a matter of timing, figuring out  8 perhaps what that person wants to do, figuring out  9 what opportunities might be appropriate. But it could  10 be a -- sometimes it's just timing of when the drills  11 occur and maybe how much we have to discuss at that  12 drill. Maybe we'll say we'll table it to the next  13 drill because there's too much on that meeting's  14 agenda.  15 Q "That would account for a delay of a month,  16 for example?  17 A "It could, theoretically, sure.  18 Q "What methods of finding work for such a  19 person are available?  20 A "Well, in some cases -- ultimately, it's the  21 person's responsibility to find another job or things  22 to do. But often, in some cases working with their  23 management team, there could be projects.  24 "As I said earlier, there could be accounts  25 that need help and we will assign a talented executive</p>
Page 1482	Page 1484
<p>1 like a project; or we may know the account is going to  2 come to an end.  3 "So there are almost an infinite number of  4 reasons why someone could be on a drill. And the  5 timing could be coincident with and corresponding to  6 what the business event is and the circumstances with  7 that employee.  8 Q "Typically, in your experience -- because I  9 know you ran Shaughnessy's and you ran most of the's  10 for a while -- typically, would someone be put on a  11 5-minute drill on or before the time they were,  12 quote/unquote 'put on the bench'?  13 A "Typically if they were on the bench, meaning  14 unsigned and they're not doing any productive work,  15 they would be on the drill.  16 Q "And in the case of somebody in  17 Mr. Castelluccio's position, if you know, what drills  18 would be appropriate drills for him to appear on?  19 A "I don't know what happened specifically in  20 his situation. I've had other executives who have  21 been on the bench, and sometimes they go on the drill  22 right away. Other times, they might wait a month or  23 two depending on the timing.  24 And then they could also stay on the drill for  25 a couple of months and then come off if there's no</p>	<p>1 to do those types of meaningful work. There has to be  2 a business need, and if there's a match of skill and  3 experience and the job that needs to get done, then it  4 works out.  5 Q "Are there procedures for that --  6 A "No.  7 Q "-- other than the 5-minute drill? I assume  8 the 5-minute drill would be a way to get somebody  9 who's on the bench work?  10 A "It's a way. But the 5-minute-drill objective  11 is to fill regular jobs, not temporary roles. I mean,  12 there could be temporary roles that are 6, 12 months  13 in duration, but that's very atypical.  14 "Special projects or tasks would be known in  15 the individual business unit. So to a GM or somebody  16 reporting to that GM and in the natural course of  17 discussion, it would come up that we need something to  18 get done.  19 Q "In a situation where a GM has a talent of a  20 vice president available for several months, is it  21 fair to say that the GM is responsible for trying to  22 help that VP find additional work?  23 A "I would say that it's not a fact. It's the  24 employee's responsibility since they're being paid by  25 IBM to make sure that they have work.</p>

Page 1485	Page 1487
<p>1 Q "My question was -- have I heard you correct 2 to say that the GM has no responsibility to assist a 3 VP to find work when the VP is on the bench? 4 A "I would not say that that's true. 5 Q "Why not? 6 A "Because we spent considerable amount of time 7 talking about the 5-minute drill, and it's our 8 protocol for executives who are without job to be 9 brought on the 5-minute drill. That is the primary 10 responsibility of the manager, to make that person 11 visible to others." 12 MR. DUFFIELD: Now, I'll move to 13 Patricia O'Malley. 14 MR. CARTA: I definitely heard a ring 15 that some of the questions were mine. 16 MR. DUFFIELD: Mr. Carta had deposed 17 Ms. Brickmeier; so I was acting as Mr. Carta. 18 So now we are in the deposition of 19 Patricia O'Malley, which was also taken by Mr. Carta. 20 (Deposition testimony read) 21 Q "Okay. I'd like to talk a little bit about 22 your background. Can you tell me about your formal 23 education beyond high school? 24 A "Sure. I have a bachelor's degree in business 25 and a master's degree in industrial labor relations.</p>	<p>1 A "I supported him as an HR partner at the time 2 that I supported that service organization. 3 Q "And which service organization was that? 4 A "At the time, it was probably called -- it was 5 "SO." I don't exactly know what our official title 6 was. It was an SO type of organization services. 7 Q "What year approximately was that? Do you 8 recall? 9 A "I'd say it was around 2002, maybe, 10 approximately. 11 Q "Is it proper protocol for a manager to ask an 12 employee his or her age? 13 A "It would have to depend on the reason they 14 were asking. Probably if they had a reason to know. 15 Q "And what would be a reason to know? 16 A "Sometimes we have students working for us, 17 and we may have an event that we serve alcohol, and we 18 need to know if the individual is of age in that state 19 and we can serve alcohol. So that might be an 20 instance where we would have to ask the individual. 21 Q "Would it be appropriate for a manager to ask 22 an employee who's clearly over 40 his or her age? 23 A "I don't know of any situation where they need 24 to know. Is it possible they need to know? I don't 25 know, but I can't I think of a reason they would need</p>
Page 1486	Page 1488
<p>1 Q "And what year did you receive those two 2 degrees and from which institutions? 3 A "My bachelor's degree was from the State 4 University of New York at Oneonta in 1979, and my 5 masters in industrial labor relations was Cornell 6 University in 1981. 7 Q "Okay. So since 1981, you've been with IBM? 8 A "Yes. 9 Q "And the next role after that? 10 A "Is my current role, which is employee and 11 labor relations leader for the U.S. 12 Q "So as employee and labor relations leader for 13 the U.S., you're responsible for all business units 14 within the U.S., is that correct? 15 A "Yes. 16 Q "And how long have you been in that role? 17 A "Three years. 18 Q "So since around 2007, you began in that role? 19 A "Yes. 20 Q "Do you know approximately when in 2007? 21 A "Approximately, February. 22 Q "Have you ever had any interaction with 23 Mr. Castelluccio? 24 A "Yes. 25 Q "Okay. Can you describe that?</p>	<p>1 to know. 2 Q "So if they don't need to know, would it be 3 appropriate for them to ask the employee his or her 4 age? 5 A "If they don't need to know, then they 6 shouldn't ask the employee their age. 7 Q "Is it appropriate for a manager to instigate 8 a conversation with an employee to ask them if they're 9 interested in retiring? 10 A "As part of career development, that would not 11 be unusual. If an employee's retiring, then we need 12 to get backfills or, you know, understand what their 13 careers are and what we're going to do. So it 14 wouldn't be unusual in a career discussion to ask 15 about retirement plans. 16 Q "If an employee indicated to his manager that 17 he was not interested in retiring, would it be 18 appropriate for the manager to bring up the issue 19 again in a subsequent career conversation? 20 A "It would depend on circumstances. 21 Q "Under what circumstances would that be 22 appropriate? 23 A "If things had changed, if something has 24 changed either in a person's personal life or in 25 business, then it may be appropriate.</p>

Page 1489	Page 1491
<p>1 Q "And do all full-time IBM employees 2 participate in an annual PBC? 3 A "Yes. 4 Q "And is the process the same for all 5 employees? 6 A "The process that's documented is the same for 7 all employees, yes. 8 Q "From the lowest-level employee to someone in 9 upper management, they would go through the same 10 process? 11 A "Setting the goals, documenting the results, 12 and ratings and assessments, yes. 13 Q "And so you've anticipated my next question. 14 So it's a three-step process, correct? 15 A "Correct: 16 Q "So the first step is setting the goals for 17 the year? 18 A "Correct. 19 Q "Does the individual employee's manager sign 20 off on the goals? 21 A "Yes. 22 Q "Who sets the goals initially? Is that the 23 employee or the manager? 24 A "The employee would set the goals. It would 25 have to be reviewed by the manager, and hopefully get</p>	<p>1 Q "So this would be if someone was -- had 2 received a 3 rating on their PBC the prior year, they 3 would need to have an internal review during the 4 current year? 5 A "Right. To provide, you know, feedback on the 6 current year. 7 Q "So if an employee received a 2 rating the 8 prior year, they could go through the entire eleven 9 months without any feedback or check-in from their 10 manager? 11 A "Correct. 12 Q "If the manager became aware -- and I'd like 13 to stick with the two-employee situation. 14 A "Okay. 15 Q "If a manager became aware of a declining 16 performance during the eleven-month period, would they 17 be expected to bring that to the employee's attention? 18 A "Yes. They should address performance issues 19 with an employee during the year. 20 Q "And at the bottom of the page you see it 21 says, 'What are the guidelines for an informal, 22 interim performance review?' 23 "Do you see that section? 24 A "Yes, I do. 25 Q "Does this section apply to only PBC 3 and</p>
Page 1490	Page 1492
<p>1 an agreement -- ideally agreement for goals. But the 2 manager, in the end, is responsible for the goals. 3 Q "Are the goals reviewed by the manager's 4 manager? 5 A "They can be, but not required. 6 Q "Are the goals intended to be reasonable goals 7 to attain within the year, or are they reaches? 8 A "That's a perspective issue. 9 Q "Okay. 10 A "So, you know, that's based on someone's 11 perspective. They're based on the -- what the goal of 12 the business is -- what goals the business needs to 13 meet. That's how they're supposed to be written. 14 Q "Would it be appropriate for a manager to sign 15 off or suggest goals that the manager knew it wouldn't 16 be possible for the employee to meet within the year? 17 A "That the employee knew it wasn't possible? 18 Q "I'm sorry. That the manager knew it wouldn't 19 be possible for the employee to meet within the year. 20 A "Well, the goals would be based on the 21 business objectives. So we would set the goals based 22 on whatever the business needed. The manager could be 23 concerned that the business objectives are tough in a 24 given year, but the goals are typically set on the 25 business objectives of that year.</p>	<p>1 lower employees, or does it this apply to all 2 employees? 3 A "The section says that managers should do an 4 interim review for any employee previously rated among 5 the lowest contributors. So the PBC 3s -- so it 6 explains that they must do it for PBC 3, and that it's 7 recommended to do it for others. 8 Q "So it would be considered a best practice to 9 have an interim review with an employee regardless of 10 their prior year's PBC rating? 11 A "I think what the document says is it's 12 recommended that at least one informal review during 13 the year is recommended. 14 Q "And are managers expected to provide more 15 frequent feedback to employees that they feel are 16 underperforming? 17 A "It would depend on the situation. If a 18 manager has major concerns about an employee that's 19 impacting customers or others, that they would at 20 least provide -- try to correct those situations. 21 Q "Okay. And, again, this is starting with the 22 premise this employee does not receive a 3 or lower 23 the prior year. 24 A "Okay. 25 Q "But they are performing their day-to-day</p>

<p style="text-align: right;">Page 1493</p> <p>1 duties and not performing as well as the manager would 2 like. 3 "Would the manager speak to them at some point 4 during the year? 5 A "What we would expect is that whatever the 6 business impact that doesn't happen -- so if something 7 doesn't happen that should happen, that they discuss 8 at the time that something, you know, doesn't happen. 9 You said that -- you had stated that the manager sees 10 something. So it's what did the manager see, and then 11 they would discuss that. 12 Q "But you would expect that the manager would 13 raise that at the time with the employee. They 14 wouldn't wait until the next PBC cycle? 15 A "If it was a major concern for them, yes. 16 Q "So if it was a concern, but not major, they 17 wouldn't raise it with the employee? 18 A "They may or may not. If it's not a big 19 concern, they may or may not. 20 Q "As far as the performance plan for the given 21 year, what are you referencing? 22 A "PBC goals. 23 Q "Okay. 24 A "PBC goals is what they -- they should have 25 PBC goals every year.</p>	<p style="text-align: right;">Page 1495</p> <p>1 one factor. 2 Q "Are there some years where there are no 3 annual incentive awards given out? 4 A "It probably has happened that we've given no 5 annual incentive. Again, that's based on IBM's 6 overall business report. 7 Q "So a person with a history of -- of 2 PBCs -- 8 is it accurate to say that their annual incentive 9 award could vary? You can answer that. Sorry. 10 A "The PBC rating is one impact. So two 11 performers could get different annual incentive 12 payments. 13 Q "And how about a single 2 performer year to 14 year? 15 A "Oh, a single 2 performer year to year would 16 see differences in their incentive payments." 17 MR. DUFFIELD: We have one more, which is 18 Garrett Walker. We'll trade roles. 19 (Deposition testimony read) 20 Q "Where did you go after high school? 21 A "To Saint Anselm College. 22 Q "Ansel? 23 A "Anselm. 24 Q "Can you spell that for us, please? 25 A "A-N-S-E-L-M.</p>
<p style="text-align: right;">Page 1494</p> <p>1 Q "Correct. 2 A "So they would have their plan, which is their 3 PBC goals. 4 Q "Is it likely that a solid performing 5 executive would be terminated solely for not finding 6 another job within IBM? 7 A "If there are no other jobs that they have -- 8 you know, that they have -- that they are the most 9 competitive candidate for, yes. 10 Q "Let me direct attention back to your 11 testimony with regard to the impact of the PBC rating 12 upon incentive compensation decisions. 13 "Do you remember that testimony? 14 A "Yes. 15 Q "Can you tell me, if an employee receives a 16 particular PBC rating, does that entitle him or her to 17 an annual incentive award in any given year? 18 A "No. 19 Q "And what relationship is there between a 20 particular PBC rating such as 2-PBC rating and annual 21 incentive award of whatever sort? 22 A "Okay. If someone's on the annual incentive 23 plan, the PBC would be taken into consideration as 24 one -- as one factor in making that decision. But 25 every year that program is different, and the PBC is</p>	<p style="text-align: right;">Page 1496</p> <p>1 Q "And where is that? 2 A "Manchester, New Hampshire. 3 Q "How long were you at Saint Anselm? 4 A "Four years. 5 Q "What year did you graduate? 6 A "1987. 7 Q "And then what happened? 8 A "I left to join IBM. 9 Q "What year was that? 10 A "2001. 11 Q "And what was your next position? 12 A "Vice president, talent, deployment, and 13 mobility. 14 Q "And how long did you hold that position? 15 A "That's my current position. 16 Q "What was your position at the time you had 17 occasion to first meet Mr. Castelluccio? 18 A "Vice president, human resources, ITDelivery. 19 Q "And that's a position you just held for four 20 and a half months? 21 A "Approximately four and a half months, yeah. 22 Q "Would you like to provide me a little detail 23 with what your responsibilities were in that position? 24 A "Yeah. I was the HR partner for the general 25 manager of ITDelivery Worldwide.</p>

<p style="text-align: right;">Page 1497</p> <p>1 Q "And who was the general manager?"</p> <p>2 A "Bob Zapfel. So I was his HR support."</p> <p>3 Q "Would you agree that you had been in the</p> <p>4 position of VP HR ITDelivery for 30 to 45 days at the</p> <p>5 time Mr. Castelluccio e-mailed you Exhibit 2?"</p> <p>6 A "Yes, I would agree."</p> <p>7 Q "I would like you to think back and share with</p> <p>8 me your best recollection of the meeting that you had</p> <p>9 with Mr. Castelluccio."</p> <p>10 A "It was a long time ago. I don't recall the</p> <p>11 specifics of the conversation. I remember it was</p> <p>12 generally a pleasant discussion. It was introductory.</p> <p>13 There was discussion along, you know -- sort of</p> <p>14 Mr. Castelluccio described his career at IBM.</p> <p>15 "I recall he was interested or conveyed</p> <p>16 interest in pursuing a new job with IBM -- different</p> <p>17 opportunity. I recall providing coaching on how that</p> <p>18 works within IBM -- more of a refresher for an</p> <p>19 executive -- but as you're thinking about that, I do</p> <p>20 remember saying, you know, we have a number of</p> <p>21 different ways that you pursue looking for a new</p> <p>22 opportunity, that you talk with your manager. You</p> <p>23 talk about where you want to go next.</p> <p>24 "We have processes that support that such as</p> <p>25 the 5-minute drill; that, you know, an employee, you</p>	<p style="text-align: right;">Page 1499</p> <p>1 use in the meeting, I would have called an end to that</p> <p>2 discussion and gotten the right people in the room.</p> <p>3 Q "Do you have a specific recollection of not</p> <p>4 hearing something? Do you have a specific</p> <p>5 recollection of -- no specific recollection, but a</p> <p>6 specific recollection of not hearing? I'm perplexed</p> <p>7 by that. Maybe I just misunderstood your answer."</p> <p>8 A "I don't recall the specifics of the</p> <p>9 discussion, which is what I stated."</p> <p>10 Q "Right."</p> <p>11 A "However, I did not hear "constructive</p> <p>12 discharge" or specific allegations of age</p> <p>13 discrimination, because I'm sensitive to that and</p> <p>14 would have called in ER immediately if I heard that."</p> <p>15 Q "And when you say you would have "called in ER</p> <p>16 immediately," you're basing that conclusion on what?</p> <p>17 What's the basis of that conclusion that you would</p> <p>18 have taken those steps?"</p> <p>19 A "Because any specifics like that, he would</p> <p>20 have triggered that. That's exactly what I would do</p> <p>21 if I heard that."</p> <p>22 Q "Then my next question is: So that's what you</p> <p>23 would have done, because that's your standard</p> <p>24 practice?"</p> <p>25 A "Yes."</p>
<p style="text-align: right;">Page 1498</p> <p>1 know, has the primary responsibility to find that next</p> <p>2 job. But part of finding that next job, besides the</p> <p>3 sort of traditional processes that we have, you also</p> <p>4 need your network, which, you know -- generally, I</p> <p>5 recall discussing, because the network that you create</p> <p>6 during your career allows you to really reach out and</p> <p>7 find opportunities that others may be aware of because</p> <p>8 they're outside of the immediate sphere."</p> <p>9 "And that's generally the conversation we had</p> <p>10 with, you know -- at least that's what I remember."</p> <p>11 Q "Do you have any recollection of him</p> <p>12 indicating to you that he was concerned about her</p> <p>13 discriminating against him on the basis of age?"</p> <p>14 A "I can say I did not hear in that conversation</p> <p>15 a specific allegation that said "age discrimination,"</p> <p>16 because at this point, I would have ended the meeting</p> <p>17 and called employee relations about facts on the table</p> <p>18 and followed a process that ER runs."</p> <p>19 Q "Do you recall any references to him feeling</p> <p>20 he was being constructively discharged?"</p> <p>21 A "No. I didn't hear that term in the meeting,</p> <p>22 because if I heard that term, I would have ended the</p> <p>23 meeting immediately and called employee relations and</p> <p>24 gotten directly involved in that. That's a very clear</p> <p>25 term that, if I would have been -- that if it had been</p>	<p style="text-align: right;">Page 1500</p> <p>1 Q "I would like to ask you a series of questions</p> <p>2 about the so-called 5-minute drills. What's the</p> <p>3 purpose?"</p> <p>4 A "5-minute drills are part of a formal process</p> <p>5 that IBM uses to fill open key positions in the</p> <p>6 business."</p> <p>7 Q "And do you know how long they've been in use?"</p> <p>8 A "I do not know."</p> <p>9 Q "Were they in use in the period of time that</p> <p>10 you were VP HR at ITDelivery?"</p> <p>11 A "Yes."</p> <p>12 Q "Can you explain the circulation method? I</p> <p>13 mean, are they pieces of paper that get sent around?</p> <p>14 Are they electronic -- just the procedure for</p> <p>15 circulating the 5-minute drills."</p> <p>16 A "5-minute drills are confidential in nature.</p> <p>17 So the distribution is limited."</p> <p>18 Q "Do you know if an employee can have</p> <p>19 themselves added on to the slate, or do they have to</p> <p>20 act through a participant?"</p> <p>21 A "An employee alone cannot choose to be</p> <p>22 included on a short-listed slate."</p> <p>23 Q "The support of your immediate supervisor is</p> <p>24 very important if you want to take advantage of the</p> <p>25 5-minute drill. Is that a fair statement?"</p>



Page 1501	Page 1503
<p>1 A "I would say that's one of the major support 2 structures. 3 Q "In Mr. Zapfel's drills was Joanne Collins-Smee 4 a participant as one of those -- as one of his direct 5 reports? 6 A "Yes. 7 Q "Do you recall -- and was she there to 8 represent ITD Americas? 9 A "Yes. 10 Q "I want to be sure I understand this. The 11 paper process -- the paper part of the ITD drill, the 12 5-minute drill, is the slate of potential candidates 13 circulated before the actual meeting? 14 A "The drill document is sent out by BTL prior 15 to the meeting, but very close to the start because of 16 the time zones. So the final document that runs, that 17 we use to talk to the meeting, is sent out generally 18 less than 24 hours before the meeting, just so that 19 everyone around the world have something to work with. 20 Q "Everyone around the world. Do people 21 participate from a distance in the meeting? I mean, 22 do some people participate through phones or other 23 means other than actually being present? 24 A "Yes. 25 Q "Do you recall whether Ms. Collins-Smee</p>	<p>1 my question is, if someone is permanently assigned to 2 a job, that's one set of circumstances. 3 "If somebody is temporarily assigned to a job, 4 based upon your own personal observation, was it IBM's 5 practice to disclose the fact that it was simply a 6 temporary assignment to that employee? 7 A "Generally, yes. If they knew it was a 8 temporary position. 9 Q "So whenever possible, before IBM, in your 10 experience, would pull an executive off a position, 11 they would have a new position for that executive to 12 move into? That's what I heard you say. I want to 13 make sure I understood it. 14 A "If it was possible to do that, yes. 15 Q "In your experience when IBM is unable to put 16 an executive into a new position, isn't it customary 17 to try to find that employee additional work, even if 18 they can't find him an additional full-time position? 19 A "If an executive is moved and there's no 20 immediate position ready for them, they are given 21 temporary work or special projects generally." 22 MR. DUFFIELD: Those are all the 23 deposition designations. 24 THE COURT: Okay. Thank you. So we have 25 concluded the evidentiary portion of this trial from</p>
Page 1502	Page 1504
<p>1 participated by being present or through some other 2 means at Zapfel's 5-minute drills? 3 "Sorry. Next question, yes, in the drills, 4 when you said you were there, and you kicked it off? 5 A "Joanne was either present in person, if she 6 was in that -- in the U.S., if you will, and by phone 7 if she was traveling in Latin America or elsewhere. 8 Q "But she was a regular participant. That's 9 what I hear you saying. 10 A "Yes. It was expected that everyone 11 participate who's a direct report. It was very rare 12 not have full participation. 13 Q "So it's fair to say, then, that a 14 supervisor's support is important -- so an important 15 avenue for getting someone on the slate of candidates? 16 A "Yes. 17 Q "Is it fair to say a supervisor's support is 18 also critical for getting you from the list of 19 candidates to the short list of candidates? 20 A "No. 21 Q "And why not? 22 A "Because the opinions -- the views of 23 collective leadership team have a lot of influence on 24 where someone's placed. 25 Q "The distinction I would like you to apply to</p>	<p>1 this point. 2 MR. FASMAN: No. We have our one witness 3 tomorrow morning, Judge. 4 THE COURT: That's right. 5 All right, ladies and gentleman, get to 6 let you go on time. Thanks very much for your hard 7 work and your attention that you've given to this 8 case. I really appreciate it. I know everybody out 9 there does as well. I think we've done a good job 10 doing what we're supposed to do. And so I thank you 11 for it. You're excused. Don't deliberate about the 12 case. Don't reach any conclusions. Keep an open 13 mind. 14 Watch your step, it's slippery out there, 15 and we'll see you tomorrow at 10 o'clock. And we will 16 be working before 10 o'clock, I promise you. Thanks 17 ladies and gentlemen. Ladies and gentleman. Have a 18 good evening. 19 (Jurors excused) 20 THE COURT: Okay. Here's the limiting 21 instruction that I'm inclined to give. I think it 22 accomplishes the task. 23 Ladies and gentlemen, you heard testimony 24 about IBM's performing an internal investigation 25 called an "open-door review" with respect to</p>

Page 1505

1 Mr. Castelluccio's allegation of age discrimination.  
 2 You may consider this testimony as evidence that IBM  
 3 takes such allegations seriously. You should not  
 4 consider it for any other purpose.

5 That agreeable?

6 MR. FASMAN: Your Honor, I think that  
 7 that's very helpful. Yes, Your Honor.

8 THE COURT: Okay, I think it's the best  
 9 we can do. And I don't think it -- you know, I really  
 10 don't think it was consequential or will be  
 11 consequential, but you can take your respective  
 12 positions, Mike or Jake.

13 So we'll finish tomorrow. We'll charge  
 14 tomorrow, we think.

15 MR. FASMAN: Thank you, Your Honor.

16 THE COURT: Let's hope there are no  
 17 blizzards or things like that. Have a good evening.

18 Wendy, thank you so much.

19 (Court adjourned)  
 20  
 21  
 22  
 23  
 24  
 25

Page 1506

1 CERTIFICATE OF REPORTER  
 2

3 I Hereby certify that the foregoing 217 pages  
 4 are a complete and accurate computer-aided  
 5 transcription of my original stenotype notes taken in  
 6 the Matter of James Castelluccio VS International  
 7 Business Machines Corporation, which was held before  
 8 The Honorable Thomas P. Smith, U.S.M.J., at U.S.  
 9 District Court, 450 Main Street, Hartford,  
 10 Connecticut, on January 22, 2014.  
 11  
 12

13 Wendy Allen, RMR, CRR  
 14 Notary Public  
 15  
 16

17 My commission expires: April 15, 2015  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

<p style="text-align: right;">Page 1506</p> <p style="text-align: center;">UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT</p> <p>JAMES CASTELLUCCIO ) Plaintiff ) 3:09-cv-01145 (TPS) ) VS ) January 23, 2014 INTERNATIONAL BUSINESS ) MACHINES CORPORATION ) Federal Building Defendant ) Hartford, Connecticut</p> <p style="text-align: center;">VOLUME 8 TRIAL HELD BEFORE THE HONORABLE THOMAS P. SMITH, U.S.M.J.</p> <p>Reporter: WENDY J. ALLEN, RPR, CRR, LSR #00221</p>	<p style="text-align: right;">Page 1508</p> <p style="text-align: center;">I N D E X</p> <p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p>WITNESSES: PAGE:</p> <p>Charles Sodikoff Direct Examination by Mr. Duffield..... 1511 Cross-Examination by Mr. Carta..... 1537 Redirect Examination by Mr. Carta..... 1547</p>
<p style="text-align: right;">Page 1507</p> <p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p>Representing the Plaintiff Carta McAlister &amp; Moore, P.C. 1120 Boston Post Road Post Office Boxer 83 Darien, CT 06820 By: Mark R. Carta, Esq. mark@cmm-law.com By: Margaret A. Triolo, Esq. margaret@cmm-law.com By: Troy Bailey, Esq.</p> <p>Representing the Defendant Paul Hastings, LLP 75 East 55th Street New York, NY 10022 By: Zachary Fasman, Esq. Zacharyfasman@paulhastings.com By: Todd C. Duffield, Esq. Toddduffield@paulhastings.com By: Jean-Marie Gutierrez</p> <p>ALSO PRESENT: Daniel Fox, Esq. IBM in-house counsel</p>	<p style="text-align: right;">Page 1509</p> <p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p>THE COURT: Any housekeeping matters to take up before we call the jury?</p> <p>MR. CARTA: Your Honor, just a minor, that Judge Squatrito has already ruled with respect to the scope of Dr. Sodikoff's testimony, and it's pretty clear what he can testify about and what he could not testify about. I assume the Court's had a chance to look at that.</p> <p>THE COURT: Yes. Well, we're going to have a charging conference after we've given you copies of the charge, and we're going to give you copies of the charge and we're going to go over it line by line, and I think at that time if somebody has a problem, that's when we get to make sure the charge is right. I want to make sure the Court gets the law right, because we want to do this only once.</p> <p>MR. CARTA: Your Honor, thank you, and your clerks for getting us the charge last night. It did help to have a chance to review it. I appreciate that.</p> <p>THE COURT: You had it last night? Good.</p> <p>MR. FASMAN: Yes. We were fine. We got it, too. No problem. Although I was interested to see the Court's using WordPerfect. That was a bit of a curve, but we dealt with it.</p>

<p style="text-align: right;">Page 1510</p> <p>1 MR. CARTA: We dealt with it. Not a 2 problem. 3 THE COURT: You wouldn't believe the 4 headaches that are caused by that, where nobody uses 5 WordPerfect, everybody uses MS Word. People like me 6 who learn the computer from the government, I don't 7 have a clue what to do with MS Word, but I'm pretty 8 good in WordPerfect. 9 MR. FASMAN: It's fine, we can translate 10 them back and forth, not a problem for us. 11 THE COURT: I understand that now the 12 federal government is phasing in MS Word, and -- 13 MR. CARTA: Let's hope it doesn't cause 14 any outages. 15 THE COURT: So that's kind of a -- that's 16 a Microsoft battle, MS Word, huh? 17 Okay, let's get the jury, then. 18 (Jurors present) 19 THE COURT: Good morning, gentleman and 20 ladies. This is Thursday, a day to be happy because 21 tomorrow's Friday. So please be seated. And I have 22 talked with counsel, and we're ready to begin. 23 MR. DUFFIELD: Morning. We call as our 24 final witness Dr. Charles Sodikoff. 25 (Charles Sodikoff, sworn by the clerk)</p>	<p style="text-align: right;">Page 1512</p> <p>1 Q Do you hold any licenses? 2 A I'm a licensed psychologist in the state of 3 New York. 4 Q Could you briefly describe your professional 5 background, professional experience? 6 A Yes. After getting my Ph.D. -- 7 MR. CARTA: Your Honor, I would be 8 willing to stipulate to Dr. Sodikoff's professional 9 qualifications. 10 THE COURT: So there's a stipulation that 11 this gentleman is an expert and may be questioned as 12 such? 13 MR. CARTA: In the area of career 14 management, that's correct. 15 MR. DUFFIELD: Okay, great. 16 BY MR. DUFFIELD: 17 Q I still think it would be helpful to have you 18 walk through just very briefly some of your work 19 experience, and then we'll get into your testimony. 20 A I started my career after my graduate degree 21 at Metropolitan Life Insurance Company, where I was in 22 the area called sales personnel research and was 23 basically on the hiring side of psychology, and we 24 were doing testing, and also doing attitude surveys of 25 the field force of Metropolitan Life.</p>
<p style="text-align: right;">Page 1511</p> <p>1 THE CLERK: Please state your name, spell 2 your last name for the record. 3 THE WITNESS: Charles L. Sodikoff, 4 S-O-D-I-K-O-F-F. 5 THE CLERK: Your business address, 6 please? 7 THE WITNESS: 1320 Sandra Lane, and 8 that's North Merrick, New York, 11566. 9 10 DIRECT EXAMINATION BY MR. DUFFIELD: 11 12 Q Good morning, Dr. Sodikoff. 13 A Morning. 14 Q Would you please tell the jury what profession 15 you're in? 16 A Yes. I'm a consultant industrial organization 17 psychologist, and my specialty is in career 18 management. 19 Q And would you explain to the jury your 20 educational background? 21 A Yes. I have a bachelor's degree in psychology 22 from Brooklyn College in New York, I have a master's 23 degree in psychology from Long Island University, and 24 I have a Ph.D. in industrial organizational psychology 25 from Wayne State University in Detroit.</p>	<p style="text-align: right;">Page 1513</p> <p>1 Q And what did you do after Met Life? 2 A After Met Life I went to a consulting firm 3 called PA Consulting Service. They're British-based 4 and worldwide. At that time they were the largest 5 consulting firm based outside the United States. 6 Q What kind of consulting were you doing with 7 them? 8 A I was working on an assessment tool or test 9 called the P-A-P-I, or the PAPI, and it was -- I was 10 asked to do a validation study to demonstrate that 11 tests could be used in the selection and hiring of 12 people. 13 Q Would you describe for the jury your 14 experience at Drake Beam and Morin? 15 A Drake Beam Morin was an outplacement firm. If 16 you're not familiar with outplacement, outplacement is 17 when somebody has been terminated, the company 18 actually pays an organization, an outplacement firm to 19 assist -- to help -- the firm assists individuals to 20 look for jobs, or move on in their career. And so I 21 was a psychologist for that firm, which meant I did 22 assessments of -- psychological assessments to help 23 them understand the strengths and their areas of 24 weaknesses and where to go. And then I handled a 25 whole caseload of candidates who were job searching,</p>

<p style="text-align: right;">Page 1514</p> <p>1 which meant I worked with them from the time that they  2 actually had been terminated until the time that they  3 moved on, and I helped them, in fact, even negotiate  4 their next job.  5 Q All right. Thank you very much.  6 And you've provided expert opinions in cases  7 like this in the past, is that correct?  8 A Yes.  9 Q Approximately how many times have you provided  10 expert opinions?  11 A Well, I've actually testified in court about  12 13 times, and I've dealt with giving my opinion in  13 different courts in well over a hundred cases.  14 Q Thank you. And what were you asked to do in  15 this case?  16 A In this case I was asked to -- first to lay  17 out what the standards were for what a diligent and  18 reasonable job search was, and then I was asked to  19 look at Mr. Castelluccio's job search efforts and  20 compare that to the standards.  21 Q And were you provided materials to review?  22 A Yes. I was provided all the documents that  23 Mr. Castelluccio provided regarding his job search. I  24 was provided information from an organization called  25 ExecuSearch, which Mr. Castelluccio used in his</p>	<p style="text-align: right;">Page 1516</p> <p>1 for, identifying all potential sources of job leads.  2 You want to get -- obviously when you're doing a job  3 search you want to hear about as many opportunities as  4 possible, and there are many different ways of  5 identifying opportunities, and you want to use all of  6 the ones -- especially the ones that are reasonable  7 for the level and the type of job you're looking for.  8 Number three is you want to use all potential  9 sources of support. There's a lot of support out  10 there to help you in your job search, and you want to  11 utilize as much of that support as possible.  12 Number four, very important, is you want to  13 take an organized approach. Because it's a full-time  14 job, because you're doing a lot of networking  15 conversations, keeping in contact with a lot of  16 people, because you're sending out a lot of paper and  17 you're collecting a lot of paper, talking to a lot of  18 people, you need to have a very organized approach so  19 you know who you've been speaking to and what you said  20 and what your next steps are, et cetera. Unless  21 you're really organized, it will fall apart.  22 And lastly, you need a very -- you need a good  23 marketing tool, because you're marketing yourself, so  24 you need a good resumé, you need good cover letters,  25 things that are designed to help people understand</p>
<p style="text-align: right;">Page 1515</p> <p>1 search. I looked at the complaint. I looked at Mr.  2 Castelluccio's deposition. And I also looked at  3 statistical information from the Bureau of Labor and  4 Statistics.  5 Q Before we talk specifically about what Mr.  6 Castelluccio did, are there standards or generally  7 expected characteristics of a reasonable and diligent  8 job search?  9 A Yes.  10 Q Could you tell us what those are, briefly?  11 A Sure. In my many years in the field of  12 outplacement, supporting people in their job search,  13 I've actually had the opportunity to read the manuals  14 and look at the manuals in effect, actually have input  15 into the manuals of the outplacement firms who were  16 the job search experts in term of what the standards  17 are for making diligent efforts to find a job, and  18 there were basically -- I could sum them up in five  19 standards.  20 Number one is the sustained effort. That  21 means you need to treat your job search as a full-time  22 job, and that's what you're doing right now if you're  23 unemployed, you're looking for a job, and it's  24 full-time.  25 Number two is, you're using or you're looking</p>	<p style="text-align: right;">Page 1517</p> <p>1 what you do and how you might fit in in their job,  2 their need.  3 Q And does a diligent and reasonable job search  4 require all five of those things, or are some more  5 important than others?  6 A Well, yes, they require all five of those, but  7 certainly some of that is more important than others.  8 I would say the three most important is you're making  9 sustained effort, that you're really treating it as a  10 full-time job.  11 Number two is the idea that you're uncovering  12 all -- as many job leads as possible, so you're using  13 all potential sources of job leads that are  14 appropriate and that fit into the time that you have  15 in your search.  16 And number three I think is very, very  17 important, that you have an organized approach and  18 that you're keeping track of everything that's going  19 on.  20 Q Let's spend a few minutes and talk about those  21 in a little more detail.  22 What do you mean by a sustained effort?  23 A Well, as I said, a sustained effort means that  24 you're looking every day, you know, that it's your  25 job, that's your full-time job, so -- and so that it</p>



<p style="text-align: right;">Page 1518</p> <p>1 doesn't mean that you're going on the internet one day  2 and sending out a couple of possible things that you  3 see or not, and then waiting a week, and next week you  4 go back on the internet, some months you don't do any  5 work at all. It means you're doing it every day as a  6 full-time job.  7 Q This morning you mentioned to me an analogy  8 about a salesperson. Can you share that analogy with  9 the jury, please?  10 A Sure. It's -- well, first of all, every  11 candidate that I meet in a job search, I have to tell  12 them the bad news. The bad news is whether they  13 wanted to or not, they're now in a sales role. They  14 are a salesperson, because they also happen to be the  15 product, and they are selling themselves, so you have  16 to go out there and sell, and it's --  17 If anybody was asked to -- you know, you hire  18 a salesperson. If that salesperson basically went on  19 the computer, sent out an e-mail with a brochure, sat  20 around waiting to get a phone call, next week sent out  21 a couple more, waited around to get a phone call, you  22 know, the follow-up, et cetera, it's a very passive  23 kind of search, and a job activity. And also, I mean,  24 you know, after a while you realize this person's not  25 bringing enough business in and you probably don't</p>	<p style="text-align: right;">Page 1520</p> <p>1 talking with people and networking and spreading out a  2 wide net of conversations where you're gathering a lot  3 of information, gathering names of other people, and  4 you're uncovering job opportunities out there. That's  5 where executives get jobs.  6 Q Can you explain what the executive recruiter  7 is and what they do?  8 A Sure. First let me tell you what the  9 executive recruiter is not. The executive recruiter  10 is not an agent. They don't work for you, they work  11 for a company. They're basically the outsource  12 recruiting arm of a company. I hire an executive  13 recruiter to find me candidates for jobs that I need  14 to fill.  15 So when one says they're using or they're  16 dealing with executive recruiters, they're not working  17 for you. You're not hiring that executive recruiter  18 to be your agent to find you a job. So there's every  19 reason, then, that you want to get your resumé in  20 front of as many executive recruiters as possible,  21 because they may have a match.  22 The key to it is that executive recruiters --  23 many executive recruiters are on a retainer, so that  24 they have the exclusive search. They're the ones that  25 know this possible search. So just by contacting them</p>
<p style="text-align: right;">Page 1519</p> <p>1 want to have that person employed as your salesperson.  2 Well, you're in a sales job, you have to treat  3 it like a sales job, and you have to work with it  4 every day. And basically also you got to get out  5 there and meet and talk to people. You can't just sit  6 behind a computer and do a search.  7 Q So that was a sustained effort.  8 The second characteristic you identified was  9 active utilization of all potential sources of job  10 leads. What does that mean?  11 A Well, there are many different ways which you  12 can uncover job opportunities, and you need to be  13 actively using those, and there are obviously certain  14 levels and certain positions, different ones more  15 productive than others, and so you need to be spending  16 that full-time job sourcing out job opportunities and  17 pursuing them.  18 Q So for someone like Mr. Castelluccio, who is a  19 senior level executive, what are some of the best  20 sources of uncovering jobs?  21 A No question that the two most critical sources  22 at executive levels are to be in contact with as  23 many -- getting your resumé in front of as many  24 executive recruiters as possible, and even more  25 important, far more important, is you're out there</p>	<p style="text-align: right;">Page 1521</p> <p>1 you never know what kind of search that they have on  2 their plate.  3 The point is, you don't want to spend a lot of  4 time with them. You want them to see your resumé, you  5 want them to look at your resumé, does it match a job  6 they have open. If it does, they'll contact you. If  7 it doesn't, you'll move on. So it doesn't take a lot  8 of time to contact executive recruiters. It just  9 needs to be done.  10 Q And how do you know which executive recruiters  11 to contact?  12 A There is a directory of executive recruiters  13 that gives you all the information, what kind of  14 functional area they specialize, what kind of industry  15 they specialize. That directory of executive  16 recruiters is available online. I think you can  17 purchase it online for about 60 dollars, but it's also  18 available in every local library that has a career  19 center. You go into the career center, you'll see  20 there's a book called the Directory of Executive  21 Recruiters. It's updated every year, and it has all  22 that information, contact information.  23 Q And are there executive recruiters that  24 specialize specifically in the IT industry?  25 A Yes, there are. There are hundreds.</p>

<p style="text-align: right;">Page 1522</p> <p>1 Q You also mentioned networking. What is 2 networking and why is that important? 3 A Let me start off with what networking is not. 4 People have a misconception. Networking is not 5 calling up a friend asking if they know of a job or 6 have a job for you. The odds of that are going to be 7 very small, unlikely, and they're going to say no, 8 sorry, but I'll keep an eye out for you. That's not 9 networking. 10 Networking is contacting people you know or 11 started out with, people that you know, and asking to 12 spend some time with them, not a lot of time, maybe 15 13 minutes at a time, to get information about what's 14 going on in the industry, that you're interested in. 15 They know stuff that you don't know that would be very 16 helpful for you. Most importantly, they know other 17 people that you might talk to. 18 And you have to remind them, I'm not asking 19 you for names of people who have a job, and you 20 probably don't know that, but you know a lot of people 21 who know other people, et cetera, know opportunities, 22 so if you could pass along three, four names, two 23 names to me, I'll contact them, let them know that you 24 suggested I speak to them, and they will, in fact, 25 spend time, 15 minutes maybe or so, giving me more</p>	<p style="text-align: right;">Page 1524</p> <p>1 them. 2 And there are quite a number. There are ones 3 that specialize, and there are ones that specialize in 4 executive levels, and there are ones that 5 specialize in IT industry. For example, diesdot-com 6 specializes in IT. And basically, you know, they're 7 very -- they're part of the process. 8 Q So you've been talking about the utilization 9 of potential job leads. The third characteristic you 10 identified was using all potential sources of support. 11 What do you mean by that? 12 A Well, you know, there's a lot of help out 13 there for people who are in job search. Even local 14 communities have support group networks, church groups 15 and religious affiliated groups have support groups, 16 where people get together and support each other and 17 share ideas and learn about how to do their job search 18 and bounce ideas about how things are going and get 19 more networking names. So there's all kind of support 20 like that. 21 There are other supports like, for example, 22 schools you went to, your alumni, you can go back to 23 often alumni career support that you could go and use. 24 Even the unemployment office these days have gotten 25 much more sophisticated in supporting people in their</p>
<p style="text-align: right;">Page 1523</p> <p>1 information about what's going on, passing along some 2 more names, and what I'm doing is spreading out a very 3 wide net -- that's why it's called networking -- of 4 conversations, and within that net you start capturing 5 opportunities, you start seeing jobs. 6 And the impact of networking is, it gives you 7 an opportunity to get in to speak to a manager 8 directly, as opposed to sending your resumé that goes 9 to human resources and human resources doesn't really 10 know the job, they have a bunch of specs they're 11 looking at and they'll see if they match up. But if 12 you're in front of a hiring manager, I don't care what 13 your specs are, you've got what I need. So it gives 14 you all the advantages in the world in terms of a job 15 search of getting in front of people through the 16 network. 17 Q How effective are online or website job 18 postings? 19 A They're useful, because they do have they're, 20 you know, they advertise and they have opportunities. 21 There's -- and so sure, if you have time in your 22 search, if you're doing a networking and you're 23 doing -- you're contacting executive recruiters and 24 you have more time, which you probably will, then get 25 online and use these job -- identify job leads through</p>	<p style="text-align: right;">Page 1525</p> <p>1 job search and providing information about how to go 2 about doing a job search and providing more 3 information. 4 And one of the -- one of the supports that, in 5 fact, Mr. Castelluccio did use was an ExecuSearch, and 6 that is basically a pay service where people -- 7 executive level individuals can get together and you 8 can utilize some of that, so there's some of that 9 available. And there are other supports out there. 10 Q The fourth characteristic was an organized 11 approach. 12 A Correct. 13 Q Can you describe that for us? 14 A Well, the point I was trying to make, and I 15 think it's important, is because you're working at a 16 full-time job in terms of looking for a job, you have 17 an awful lot of information you can -- you've been 18 gathering information, gathering names, gathering 19 phone numbers, you've been sending out your resumé to 20 places, you've been -- you know, so you need to keep 21 notes. You need to keep it under control. 22 What I'm looking for is do you have notes of 23 conversations, do you have a calendar that says when 24 your meetings took place and when you have future 25 meetings coming up. All these things need to be under</p>

<p style="text-align: right;">Page 1526</p> <p>1 control. If you have a file either computer, in the 2 computer or handwritten file, all the contacts that 3 you've been making. 4 Q And the last one was a well-constructed resumé 5 or cover letter. Can you explain what you were 6 looking for there? 7 A Your resumé is your advertisement. And by the 8 way, your advertisement doesn't get you a job, but it 9 does get you interviews, and that's what the purpose 10 of a resumé is. So it's got to be attractive, it's 11 got to be readable, it's got to make -- get to the 12 point of what you're trying to -- what you have to 13 sell, what your product is, and it's got to be 14 persuasive for people to say, okay, I'm interested in 15 speaking with you. And in addition to the resumé 16 usually there's a cover letter that even helps further 17 pinpoint where you match up with an individual. 18 Q Okay, thank you very much. 19 I'd now like to shift to Mr. Castelluccio's 20 job search. 21 A Sure. 22 Q How did his job search compare to the 23 standards you just described? 24 A Okay. Well, may I go one by one through that? 25 Q Please.</p>	<p style="text-align: right;">Page 1528</p> <p>1 that he had covered in that period of time, there were 2 13 months that there was no activity at all. It just 3 was not a sustained effort. 4 Q And did you do your own independent job search 5 to see what kind of IT executive positions were 6 available? 7 A Yes. In April of 2010 I said, well, you know, 8 are there jobs out there, and so I went online and did 9 a search, and about a three-hour search, and I looked 10 at a number of different job leads. And remember, 11 this is a limited source of job opportunities, and I 12 was able to uncover 36, I believe, job opportunities 13 that were appropriate for Mr. Castelluccio to send his 14 resumé, and it would have been very appropriate to 15 send those. So I could find 36 opportunities in a 16 three-hour search on a single day. There were 17 obviously from my professional opinion, you know, 18 obviously hundreds of opportunities out there that he 19 could have been following up on. 20 Q Did Mr. Castelluccio use all potential sources 21 of job leads? 22 A In terms of all potential sources of job 23 leads, he basically looked -- as I said, his -- it was 24 very clear that his primary source of job leads was 25 ExecuSearch, which is -- I mean it was a good source,</p>
<p style="text-align: right;">Page 1527</p> <p>1 A Question of sustained effort. Clearly, of all 2 the documents I saw in terms of depositions, et 3 cetera, he was not making a sustained effort. You 4 know, for example, I looked over -- if you take a 21 5 month period that provided information on past the 6 time he was terminated, I'm not talking about pre, I'm 7 talking about past the time he was terminated, the 8 data that I got, the documents indicated that there 9 were 25 opportunities uncovered. They weren't even 10 necessarily places where he applied, but 25 11 opportunities that were uncovered in a 12 month 12 period, which is about one a month, which is very 13 slight. 14 Well, in addition to that, when we got 15 information from ExecuNet, they said that they sent 16 him 28 e-mails of opportunities to which he applied to 17 nine. So even though I got documents that said he had 18 25, it would seem to indicate he didn't even apply to 19 those 25, but he had received information about. He 20 relied mostly on ExecuSearch website, and again, 21 e-mails from ExecuSearch, and was very limited in 22 terms of that. 23 Oh, and one other thing is if you look over -- 24 and I organized all the documents that I received and 25 numbered them, put them in place. Of the 21 months</p>	<p style="text-align: right;">Page 1529</p> <p>1 there was nothing wrong with doing that, but he wasn't 2 out networking. He wasn't out there. He didn't 3 contact directly executive recruiters. He spoke to 4 some executive recruiters who contacted him, but he 5 didn't reach out to other executive recruiters. It 6 was very little activity as far as uncovering sources 7 of jobs. 8 Q What about using sources of support, what did 9 you see there? 10 A He went to -- the only thing I could identify 11 in terms of support was that he had gone to some 12 seminars, group meetings, I should say, from 13 ExecuSearch, and it was interesting because he said I 14 think in his deposition that he had gotten a list of 15 names of people from those meetings, but there was no 16 evidence that he followed up on any of those names 17 that he'd gotten, so he hadn't really used that to 18 network with. 19 And then he did say he -- he also said that he 20 listened to some webinars, but it wasn't even clear 21 that -- they may have been technical webinars. I'm 22 not sure what those webinars were. 23 Q Could you tell whether Mr. Castelluccio 24 effectively used his network? 25 A Well, I saw no evidence that he really was</p>

<p style="text-align: right;">Page 1530</p> <p>1 networking.</p> <p>2 Q What kind of network would you expect a</p> <p>3 40-year IT executive from IBM to have?</p> <p>4 A I would expect that person to have quite a</p> <p>5 wide network of people that they had met during their</p> <p>6 career. I say to every candidate, networking are</p> <p>7 people who know you and like you, network are people</p> <p>8 who know you and don't hate you, anybody that's</p> <p>9 willing to talk to you. So it's a very wide network</p> <p>10 of people that you could start with, and that's just</p> <p>11 starting, because then what you're doing is generating</p> <p>12 names from your network to speak to other people in</p> <p>13 the process, and so I would have to assume he had an</p> <p>14 excellent network.</p> <p>15 Q Did Mr. Castelluccio use an organized approach</p> <p>16 to his job search?</p> <p>17 A Again, I didn't see any evidence of an</p> <p>18 organized approach. I didn't see any notes from</p> <p>19 meetings or notes from discussions. I didn't see any</p> <p>20 calendar of activity and meetings. And certainly when</p> <p>21 I got to the pile of papers that indicated that he had</p> <p>22 had contact about job opportunities, even some of</p> <p>23 that, as I understand it, was -- he hadn't retained it</p> <p>24 anywhere and had to go back and search from</p> <p>25 ExecuSearch, pull them out from ExecuSearch. So he</p>	<p style="text-align: right;">Page 1532</p> <p>1 just thought there were two areas that were a bit</p> <p>2 concerning, is if you look at the resumé, it may be</p> <p>3 because the way this is printed out, but it's in small</p> <p>4 type. It's a little hard to read and very condensed</p> <p>5 with a lot of information.</p> <p>6 And remember, your resumé is an ad, so if you</p> <p>7 think of -- if you're looking through a newspaper and</p> <p>8 you're looking through a magazine, or let's just say</p> <p>9 you're looking -- if you see an ad full of text and a</p> <p>10 lot of information, et cetera, you know, you're not</p> <p>11 going to go past that, because you don't want to spend</p> <p>12 the time reading all that, whereas when you see</p> <p>13 something you stop and look at that it attaches your</p> <p>14 eye, catches your attention, and you spend some time</p> <p>15 with it.</p> <p>16 This a little overly-cluttered and a little</p> <p>17 burdensome, in a sense, for the reader, and I'm not</p> <p>18 sure that they would read it all. So that's one</p> <p>19 thing. And again, I don't want to over-criticize</p> <p>20 that, but it was just one thing to say.</p> <p>21 And the other is, I think far more important,</p> <p>22 is there are a bunch of red flags in here because</p> <p>23 there's missing stuff. There's like dates, you know,</p> <p>24 when did he do these things, when did he work and</p> <p>25 what -- and that's what I'm expecting, when I'm</p>
<p style="text-align: right;">Page 1531</p> <p>1 really wasn't keeping notes of all activity. I have</p> <p>2 to say from what I could see there wasn't that much</p> <p>3 activity to keep notes on, but that's --</p> <p>4 Q Did you have an opportunity to review any of</p> <p>5 Mr. Castelluccio's resumé's?</p> <p>6 A I did.</p> <p>7 Q There should be a couple black binders, maybe</p> <p>8 at your feet. One of them should have Defendant's</p> <p>9 Exhibit 188 and 189.</p> <p>10 A Sorry?</p> <p>11 Q 188 and 189, the second binder.</p> <p>12 Are these the two resumé's that were provided</p> <p>13 to you?</p> <p>14 A Yes.</p> <p>15 MR. DUFFIELD: Ladies and gentlemen,</p> <p>16 you'll have copies of those in your binder when you go</p> <p>17 to deliberate, so we're not going to spend a lot of</p> <p>18 time -- you don't need to strain to see them.</p> <p>19 BY MR. DUFFIELD:</p> <p>20 Q But Dr. Sodikoff, did you have any concerns</p> <p>21 with either these two resumé's for Mr. Castelluccio</p> <p>22 that he provided?</p> <p>23 A I don't want to be overly critical of the</p> <p>24 resumé because it does contain a lot of information on</p> <p>25 there, which is fine. I just thought there were -- I</p>	<p style="text-align: right;">Page 1533</p> <p>1 looking at a resumé. I'm looking to say okay, when</p> <p>2 did you work, what were the dates. And you really</p> <p>3 have to search within the body of this thing, all the</p> <p>4 text, to find some dates that -- and it still doesn't</p> <p>5 explain when and the times and when you were doing</p> <p>6 what you were doing. So I think that's a problem.</p> <p>7 And the other red flag is, education seems to</p> <p>8 be avoided. So there's some stuff in there, but it's</p> <p>9 not clear what it is, and so that's a red flag. I</p> <p>10 mean why don't you just tell me what your educational</p> <p>11 background is rather than make me try to figure out</p> <p>12 and kind of guess what it is. You want to make it</p> <p>13 much clearer.</p> <p>14 Q What if the person didn't attend college, how</p> <p>15 do they deal with that?</p> <p>16 A Pardon me?</p> <p>17 Q What if they didn't attend college, how do you</p> <p>18 deal with that on a resumé?</p> <p>19 A First, as I understand, Mr. Castelluccio</p> <p>20 attended some college, and so you can put down what,</p> <p>21 you know, education, course work that you had and</p> <p>22 different schools. You don't have to say you</p> <p>23 graduated, because you didn't. You don't have a</p> <p>24 degree.</p> <p>25 And then you also have -- over the 40-year</p>



<p style="text-align: right;">Page 1534</p> <p>1 course of his career I'm sure he had a lot of  2 professional education coming from an organization  3 like IBM, both internal and external, inside the  4 organization and outside, and you can list all that  5 work.  6 You know, when someone gets to a 40-year  7 career, and I'm looking to hire a senior executive  8 with a 40-year career, the chances of my being worried  9 about what your education was 40 years ago is very  10 small compared to what I think you know and understand  11 and what you've been doing in the 40 years on the job.  12 Q As you know, when Mr. Castelluccio left IBM in  13 the middle of 2008, the economy was on the fritz. How  14 would the economic downturn have affected his job  15 search or ability to find a job?  16 A Well, as everyone knows, this was a serious --  17 has been a serious economic downturn, and it has  18 affected job search, affected jobs. But there is kind  19 of a mythology out there that that means nobody's  20 getting jobs. People are getting jobs. It's just  21 taking longer for them to find jobs. That's kind of  22 why you're seeing the unemployment rate dropping down  23 now, back to where it was. But people are getting  24 jobs. It's just taking them longer. And in fact, it  25 may be two times -- may be sometimes two and a half,</p>	<p style="text-align: right;">Page 1536</p> <p>1 MR. DUFFIELD: All right.  2 BY MR. DUFFIELD:  3 Q How does a candidate's age, particularly in  4 the IT industry, affect job prospects in today's  5 market?  6 A Well, let's talk about -- age is a factor.  7 I've been in this career for 30 years or so, more, and  8 it impacts, but the impact is -- means that the search  9 for someone at hire, add on -- depending on the  10 economic conditions, add on maybe four to eight to ten  11 weeks of extra search time.  12 But people in that age group get jobs, and  13 it's clear over and over again, people get jobs. It  14 just may take them a little longer. It's specifically  15 in IT there is, you know, it's fair to say that in IT,  16 which is high technology, that people are concerned  17 whether you're up-to-date, whether you're keeping up,  18 that you're not working with old equipment and  19 technology and therefore you don't -- you're not  20 appropriate for modern IT work.  21 However, at high executive levels where you're  22 not doing the technical work, what you're doing is  23 running, managing an area, you're given a project and  24 you're seeing the project through from the beginning  25 until the end, and you're managing that whole project,</p>
<p style="text-align: right;">Page 1535</p> <p>1 three times as long as it might have taken in 2008 or  2 seven to get the job.  3 But I did look at the information, Bureau of  4 Labor Statistics, and I looked in the age category,  5 Mr. Castelluccio's age category, which was 55 to 64,  6 and I looked to see how long it would take to get a  7 job. In 2008 it was taking about 22 weeks to find a  8 job, and in 2009 it was taking about 30 weeks, and in  9 2010 it bumped up to about 41 weeks.  10 MR. CARTA: Your Honor, I'm going to  11 object. There's already been a ruling that the  12 conclusions about time periods are unreliable. Judge  13 Squatrito specifically said the sources of information  14 that this expert was relying upon didn't pass the  15 Daubert test because they were not based upon  16 comparable positions. The Court may remember that  17 part of Judge Squatrito's opinion.  18 THE COURT: I do recall it. Counselor?  19 MR. DUFFIELD: His testimony isn't --  20 he's not testifying about how long he should have  21 taken to find a job or how long it would have taken  22 him. He's talking about statistics out there about  23 the age range.  24 THE COURT: Okay. Let's go on to a  25 different subject.</p>	<p style="text-align: right;">Page 1537</p> <p>1 it's -- the relevance in terms of whether you're --  2 you've been in IT for 40 years or you've been in IT  3 for 20 years is not important. If you've got evidence  4 that you can still -- you've been working and doing  5 project work that's successful, up until the current  6 time, then you're demonstrating that you have the  7 goods to do the job, and it really is irrelevant as to  8 what your age is.  9 Q And, in fact, someone who had been in the  10 industry for 40 years, that would be a plus for them,  11 would it not, in finding a job?  12 A Certainly it is, especially in IBM, you know,  13 which is a very prestigious organization. You've got  14 to think that that's a big plus.  15 Q Thank you very much.  16 MR. DUFFIELD: I have no further  17 questions.  18 THE COURT: Mr. Carta?  19 MR. CARTA: Thank you, Your Honor.  20  21 CROSS-EXAMINATION BY MR. CARTA:  22  23 Q Good morning, Mr. Sodikoff. How are you?  24 A Good morning. How are you?  25 Q Well, thank you.</p>



<p style="text-align: right;">Page 1538</p> <p>1 Let's start off with the resumé. That seems  2 like a reasonably good place to start. You reviewed  3 just the two resúmes that were exhibits, isn't that  4 correct?  5 A I believe so, yes.  6 Q With respect to Mr. Castelluccio?  7 A I believe so, yes.  8 Q And wouldn't you agree that the best resumé is  9 one specifically tailored for a specific job?  10 A I think it's a very good idea to -- if you can  11 tailor your resumé to a specific job, that could make  12 the point better, yes.  13 Q And you spoke very highly of outplacement  14 executives, and would you agree that it's a good  15 practice to speak with an outplacement executive who  16 has the job, as you explained to the jurors, and work  17 with them to revise and tailor your resumé as  18 suggested by an outplacement expert for the job he or  19 she has?  20 A I just want to be clear. Are you saying it's  21 a good idea to get advice from someone's who's an  22 outplacement or career management in terms of how to  23 put together your resumé, is that what you're asking?  24 Q No.  25 A Okay.</p>	<p style="text-align: right;">Page 1540</p> <p>1 it to the company in a way that they will get better  2 information. So that's certainly possible.  3 Q And wouldn't you agree that when you get that  4 kind of feedback from an executive recruiter, that  5 that's an ideal way to then tailor your resumé for the  6 specific job that he or she has?  7 A Well, I would agree that if I'm looking to  8 hire you, and I'm the executive recruiter, and I'm  9 telling you, put your resumé together this way because  10 I want to present it to my client this way, that  11 that's a smart thing to do, yes.  12 Q Absolutely, very smart thing to do.  13 And you haven't seen a single one of the  14 resúmes that Mr. Castelluccio tailored for specific  15 jobs working through an executive recruiter, have you?  16 A Well, it's a different use of the resumé, so  17 no, I have not.  18 Q You just saw the two that were exhibits,  19 that's right, didn't we already establish that?  20 A Those are the ones that were being sent to the  21 executive recruiter in the first place, isn't that  22 what you're saying?  23 Q No. I'm asking if you've seen anything other  24 than the two exhibits that you've just talked about?  25 A No, I haven't seen other than.</p>
<p style="text-align: right;">Page 1539</p> <p>1 Q I can see where it was unclear. Let me try  2 again. Thanks.  3 If an outplacement executive has been hired by  4 your company to fill a specific position, that's their  5 job, isn't it?  6 A No. So we need to make -- you're talking  7 about executive recruiter? Or you're talking about.  8 Q I'm sorry, you're right. I think I misused  9 the phrase. Executive recruiter. Let's talk about an  10 executive recruiter who has a specific job and he's  11 been hired by a company to fill that job.  12 A Correct.  13 Q Wouldn't you agree that the best strategy is  14 to work with that executive recruiter in order to  15 tailor your resumé for that specific job?  16 A Well, the executive recruiter needs to see  17 your resumé. So the point being is you got to have  18 the resumé before you met with the executive recruiter  19 to take his advice.  20 What happens sometimes is an executive  21 recruiter -- you'd like to -- he likes your -- he  22 likes you, he thinks he'd like to present you to his  23 organization, and so that executive recruiter may say,  24 okay, but your resumé isn't good, so I want to help  25 you adjust the resumé so we can get -- we can present</p>	<p style="text-align: right;">Page 1541</p> <p>1 Q You've seen no others, right?  2 A I don't believe so. I mean, you know, I'd  3 have to go back to the pile of paper that I had  4 received originally and see if there was something in  5 there like that, but I don't recall that.  6 Q Okay. Do you recall that I conducted your  7 deposition in September of 2010?  8 A Pardon?  9 Q Do you recall that I conducted your deposition  10 in 2010?  11 A Yes.  12 Q September of 2010?  13 A Yes.  14 Q And that was, goodness, quite some time ago.  15 At the time of your deposition do you recall  16 that we discussed an analysis that you had done based  17 upon the first 21 months of Mr. Castelluccio's job  18 search?  19 A Post termination?  20 Q Yes.  21 A Yes.  22 Q And the reference you've made to your review  23 of materials for a 21-month period, that's the same 21  24 month period that you were referring to back in  25 September of 2010, isn't it?</p>

<p style="text-align: right;">Page 1542</p> <p>1 A Yes.</p> <p>2 Q So has IBM shown you the additional materials</p> <p>3 that Mr. Castelluccio has produced with respect to his</p> <p>4 job search since the time of your deposition, since</p> <p>5 September of 2010?</p> <p>6 A Since 2010? No.</p> <p>7 Q So you're not aware, for example, of Exhibit</p> <p>8 105?</p> <p>9 I'm not sure what book you have in front of</p> <p>10 you. Is that Defendant's or Plaintiff's? Let me get</p> <p>11 you the correct one.</p> <p>12 I'll show them to you. That might be faster.</p> <p>13 Have you seen this list of additional job</p> <p>14 search resources? Has IBM shown that to you? I'm</p> <p>15 just looking for a yes or no. I want to know if</p> <p>16 you've had an opportunity --</p> <p>17 A May I look at it?</p> <p>18 Q Please, by all means, yes.</p> <p>19 A Thank you.</p> <p>20 I'm not a hundred percent sure, but I think</p> <p>21 maybe earlier this year I was sent a copy of this.</p> <p>22 Q Okay. And do you recall whether you evaluated</p> <p>23 this in connection with your -- question withdrawn.</p> <p>24 When you were testifying earlier about Mr.</p> <p>25 Castelluccio's research, it was based upon the</p>	<p style="text-align: right;">Page 1544</p> <p>1 and the data to see whether I'm looking at the same</p> <p>2 thing.</p> <p>3 Q Let me rephrase my question more carefully.</p> <p>4 Isn't it true that analysis that you did</p> <p>5 previously did not include all of this information?</p> <p>6 A Obviously not.</p> <p>7 Q Yeah, obviously not.</p> <p>8 And when I say "all of this information," at</p> <p>9 this point I'm referring to all three exhibits that I</p> <p>10 just presented you with, sir.</p> <p>11 I'm sorry, your answer?</p> <p>12 A Was there a question?</p> <p>13 Q Yes. The question was, am I right that your</p> <p>14 analysis did not include all of the information</p> <p>15 contained in the three exhibits that I've just</p> <p>16 presented to you?</p> <p>17 A My analysis did not include all of this</p> <p>18 information.</p> <p>19 Q And in fact --</p> <p>20 A Yeah, this first information you gave me</p> <p>21 doesn't have any dates on it, so I don't -- I wouldn't</p> <p>22 know.</p> <p>23 Q But your analysis, the one that you spoken to</p> <p>24 the jury about, that's based -- with respect to Mr.</p> <p>25 Castelluccio's search, that's based upon documents</p>
<p style="text-align: right;">Page 1543</p> <p>1 materials that you'd received previously, it didn't</p> <p>2 include these materials, did it?</p> <p>3 MR. DUFFIELD: Your Honor.</p> <p>4 THE WITNESS: This was not included in</p> <p>5 the original materials.</p> <p>6 BY MR. CARTA:</p> <p>7 Q And with respect to Exhibit --</p> <p>8 MR. DUFFIELD: Your Honor, could I ask</p> <p>9 Mr. Carta to come back here so I can hear him? It's</p> <p>10 hard for me to hear you with your back to us.</p> <p>11 MR. CARTA: I'm sorry. Let me just leave</p> <p>12 these up here then.</p> <p>13 MR. DUFFIELD: Great.</p> <p>14 BY MR. CARTA:</p> <p>15 Q This is Exhibit 104 and Exhibit 103.</p> <p>16 And again, my question is a simple yes or no.</p> <p>17 When you did your analysis with respect to Mr.</p> <p>18 Castelluccio's first 21 months, you weren't taking</p> <p>19 into consideration the information that's contained in</p> <p>20 these documents, isn't that correct?</p> <p>21 A Well, I don't think that's correct, because</p> <p>22 I'm looking at this here now and it's dated 2008</p> <p>23 through 2010, after my report, and I don't know if</p> <p>24 there was duplicated information or whether that was</p> <p>25 not in the information. I'd have to check my records</p>	<p style="text-align: right;">Page 1545</p> <p>1 that were given to you before your deposition in 2010,</p> <p>2 is that correct?</p> <p>3 A Yes.</p> <p>4 MR. CARTA: May I have a moment, Your</p> <p>5 Honor?</p> <p>6 THE COURT: Yes.</p> <p>7 BY MR. CARTA:</p> <p>8 Q Dr. Sodikoff, I think you said you're a career</p> <p>9 management -- that that's your area of expertise?</p> <p>10 A Career management, yes.</p> <p>11 Q And you're not an economist. You're not an</p> <p>12 economist, isn't that right?</p> <p>13 A No, I'm not.</p> <p>14 Q And you're not qualified to perform an</p> <p>15 economic analysis of Mr. Castelluccio's economic loss,</p> <p>16 isn't that correct?</p> <p>17 A Correct.</p> <p>18 Q And the entire point of your testimony</p> <p>19 concerns your opinion concerning the nature and degree</p> <p>20 of the efforts you maintain that typify an average job</p> <p>21 search, is that what you've been testifying about?</p> <p>22 A I'm sorry, I didn't understand the question.</p> <p>23 Q Fair enough.</p> <p>24 As I understand it, just so that I understand</p> <p>25 you, the point of your testimony is that it concerns</p>

<p style="text-align: right;">Page 1546</p> <p>1 your opinion about the nature and extent of Mr.  2 Castelluccio's efforts to find a job?  3 A Well, I laid out what the standards are for a  4 diligent job search, and then I compared Mr.  5 Castelluccio's efforts to that, yes.  6 Q And that's based upon information that has not  7 been updated since September, since before September  8 of 2010, isn't that correct?  9 A Well, it's based on information that pertains  10 to six -- at least six months of search prior to his  11 termination and 21 months of search post his  12 termination, which is a long period of time.  13 Q Okay.  14 A And it's based on that information.  15 Q So the answer to my question is yes, it  16 includes information -- it includes no information  17 after the time of your deposition in September of  18 2010, right?  19 A It contains no information after my deposition  20 or my report at deposition indicating what a job  21 search -- what a diligent job search looks like, yes.  22 Q Thank you very much, sir.  23  24  25</p>	<p style="text-align: right;">Page 1548</p> <p>1 the only two resumés that we provided you?  2 A I actually don't recall that, in fact, those  3 were the only two.  4 Q I'll represent to the Court those were the  5 only two that we provided to you. They were the only  6 ones provided to us.  7 So my final question is, did Mr. Castelluccio  8 provide any resumés that were tailored to a specific  9 job?  10 A No.  11 MR. DUFFIELD: No further questions, Your  12 Honor.  13 THE COURT: Mr. Carta?  14 MR. CARTA: No questions, Your Honor.  15 THE COURT: Okay. Thank you, sir. You  16 may step down.  17 THE WITNESS: Thank you.  18 MR. FASMAN: Your Honor, Dr. Sodikoff was  19 our last witness and the Defendant rests.  20 THE COURT: Okay. And there's rebuttal?  21 MR. CARTA: No rebuttal, Your Honor.  22 THE COURT: All right. Well, ladies and  23 gentlemen, the lawyers and I have to meet in my  24 chambers and we have to go over what's known as the  25 jury charge, the jury instructions, and that's a</p>
<p style="text-align: right;">Page 1547</p> <p>1 REDIRECT EXAMINATION BY MR. DUFFIELD:  2  3 Q Dr. Sodikoff, do you remember me reaching out  4 to you about a year and a half ago, approximately,  5 with some additional documents that Mr. Castelluccio  6 had just recently provided us?  7 A I do have a vague memory of that, yes.  8 Q And did you review those documents?  9 A I looked at them, yeah.  10 Q Do you remember them being a quite heavy stack  11 of ExecuNet searches?  12 A I don't have a -- it was while ago.  13 Q Did we ask you to do an additional report  14 based on that new evidence?  15 A No.  16 Q But you've had a chance to review that, and  17 does it change your opinion about the reasonableness  18 of the search that Mr. Castelluccio conducted?  19 A It didn't change my opinion, no, absolutely  20 not.  21 Q And as part of your review of documents, you  22 asked for everything that we had received from Mr.  23 Castelluccio by way of his resumé, for example?  24 A Yes.  25 Q And the two documents that I showed you were</p>	<p style="text-align: right;">Page 1549</p> <p>1 statement of the law that I have to give you so you  2 can apply that law to the facts that you find, and  3 that's going to take a little while. After the jury  4 charge, counsel will come back, and they're going to  5 make their closing arguments.  6 I'm trying to estimate. If the weather  7 were nicer I'd be able to suggest that you take a walk  8 in the beautiful park that we have down here, maybe go  9 over to the Wadsworth Museum, which is really great.  10 I don't know that it's open on Thursdays. Maybe it  11 is. It's kind of expensive to get in there, though.  12 I think the last time I went there I went with law  13 clerk and we were going to have lunch and the  14 gentleman at the desk said, well, that'll be 32  15 dollars, and I said, wait a minute, we weren't going  16 to spend that much for lunch and now you're saying 16  17 dollars a piece to get in? It was a lot of money, so  18 we wound up going to a hotdog stand.  19 The weather is so intemperate. I think  20 the best thing for me to do is have you go back to the  21 jury room. If you brought a paperback or something,  22 or if you're one of these people who go walking around  23 you see in malls getting exercise -- my wife is trying  24 to get me to do all the time. All I can do is promise  25 you that we will be working as quickly as we can to do</p>

<p style="text-align: right;">Page 1550</p> <p>1 what we have to do, so we can get you back here. But  2 don't go home. Don't go on an extended shopping  3 spree. We'll take a recess now, and we'll reconvene  4 when we're ready to have the lawyers present their  5 closing arguments.  6 (Jurors excused)  7 THE COURT: I don't know what you ladies  8 and gentlemen are going to want to do. The lawyers  9 are going to be coming back to the charging  10 conference, and if there's anybody else -- there's not  11 an awful lot to do around here, especially when the  12 weather is as frigid as it is. But let me see counsel  13 down in my chambers and we'll talk about the jury  14 charge. Stand in recess.  15 (Recess)  16 THE COURT: Okay, let's go over this.  17 The way we usually do it, we go page by page, read  18 page 1, you say okay, okay, page 2. It's not really  19 that long, 18, 20 pages. The numbers are off.  20 MR. FASMAN: I've got 17.  21 THE COURT: 17.  22 MR. CARTA: Your Honor, I have a small,  23 small nitpick in the second paragraph, and it's just  24 the use of the word "bias". I think that that is the  25 standard language, "sympathy as well as bias have no</p>	<p style="text-align: right;">Page 1552</p> <p>1 it, but I'll take out "bias," so just say "sympathy".  2 MR. CARTA: "Has."  3 THE COURT: "Has," okay.  4 MR. FASMAN: Then there's the second  5 reference to that in that same paragraph, Judge, where  6 it says -- same sentence, where it says "sympathy or  7 bias" below. I presume you want that out, too.  8 MR. CARTA: Yes, please.  9 MR. FASMAN: All right.  10 MR. CARTA: Thank you.  11 MR. FASMAN: I don't think we had any  12 changes on 2.  13 MR. DUFFIELD: No.  14 THE COURT: I have read this so many  15 times.  16 MR. FASMAN: Sitting here saying what are  17 you going to say about this that hasn't already been  18 said?  19 THE COURT: Well, every now and then  20 someone comes up with an argument or a point and say,  21 well, okay, not a big deal.  22 MR. DUFFIELD: I don't think we had any  23 comments on the third page, either.  24 MR. FASMAN: No.  25 THE COURT: It's pretty much all</p>
<p style="text-align: right;">Page 1551</p> <p>1 place in the case." Just because it's an age case and  2 we talk a whole lot about bias and we talked about it  3 the whole time, I just would prefer it just say  4 "sympathy has no place in the case." I think that's  5 the point.  6 THE COURT: I have no problem with it.  7 Do you have any problem with it?  8 MR. FASMAN: This is a standard  9 instruction. I think that "bias" should be in there,  10 but if he wants to strike it out --  11 THE COURT: How about "bigotry"?  12 MR. FASMAN: No.  13 THE COURT: That's a little too harsh.  14 MR. CARTA: I think it has to do with  15 sympathy here, that's the concept.  16 THE COURT: We should have it on the  17 record, the record should reflect that we're all here  18 in my library, and we're going over the jury charge,  19 and we have the three lawyers from IBM, Plaintiff's  20 two lawyers, my lawyer clerk, Wendy, who's the  21 stenographer taking everything down, and we are doing  22 the jury charge, and Mark Carta has just suggested  23 that "bias" is objectionable to him. Attorney Zack  24 Fasman has said that, you know, it's standard  25 language, so he doesn't think there's any problem with</p>	<p style="text-align: right;">Page 1553</p> <p>1 boilerplate up to -- but you should read it because we  2 might have something in there. I think we start  3 getting to the ducks on page 7. But I encourage you  4 to read page 4, 5 and 6 carefully just in case there's  5 something in this that you find objectionable.  6 MR. FASMAN: We read them last night.  7 We're fine with those. We were fine all the way up to  8 page 7. We don't have any changes.  9 THE COURT: Okay.  10 MR. CARTA: I'm a little step behind,  11 just need to catch up.  12 I always wonder with the word  13 "preponderates". Is that really a word?  14 THE COURT: You know, I don't know. Once  15 there was somebody in the legal profession who's  16 literate, I don't mean literate, I mean literate, so I  17 think we've been going on faith.  18 THE LAW CLERK: I don't think spell check  19 picked it up.  20 THE COURT: Just as an aside, if you ever  21 want to do research, go into Westlaw and search for,  22 in opinions, opinions of United States Supreme Court,  23 search for S-U-P-E-R-C-E-D-E-D, superseded spelled  24 with a C, and there are dozens of them. There are  25 dozens of them. I didn't realize it was spelled with</p>

<p style="text-align: right;">Page 1554</p> <p>1 an S until I was the early years in this job, but it's 2 S. But seems like it should be a C. 3 MR. FASMAN: So if I may, Judge, on 7, 8 4 and 9, I thought that the burden of proof instruction 5 was actually very well done. Don't get rid of these 6 guys. I thought it was fine. 7 I'm not sure where to raise these things, 8 but I had two questions on burden of proof. One of 9 them was subjective belief. We had a request to 10 charge number 4 on Plaintiff's subjective belief, and 11 the reason we brought that up is -- and we may have 12 over-phrased it or mis-phrased it, but Mr. 13 Castelluccio, remember he challenged those seven 14 positions, and he said, you know, I was equally 15 qualified for those seven positions, but the only 16 evidence that was presented on that was his subjective 17 belief, and I think the jury ought to be told that the 18 Plaintiff's subjective belief or the subjective belief 19 of co-workers is not proof of discrimination. I think 20 the law is pretty clear on that. 21 So I mean it's really a question of do we 22 want to tell them that, and I think we do, because 23 this has been raised as an issue, and Mr. Castelluccio 24 said oh, these people were not as good. Collins 25 testified that she picked the people she wanted</p>	<p style="text-align: right;">Page 1556</p> <p>1 I sent them to you, too, a post trial. 2 MS. TRIOLO: When did you send it? 3 MR. FASMAN: On Sunday, Monday? 4 THE COURT: Okay. If this were testimony 5 and the jury was there and Mark or you asked Mr. 6 Castelluccio whether he was qualified to perform this 7 particular job, he'd be able to give his opinion, and 8 during closing argument you'd be able to say, well, 9 you know, that's his opinion. 10 I mean Smith believes that he's qualified 11 to sit on the Supreme Court. I mean I could say that, 12 and then afterwards would say yeah, really, and those 13 who didn't agree with me would say, well, you know, 14 no, he's not, he has no appellate experience, he 15 has -- 16 So I think -- I mean he certainly has a 17 right to testify and to offer his opinion, and his 18 opinion is evidence. Your objection really goes to 19 the weight, if any, that the jury's going to attach to 20 that. 21 MR. FASMAN: Correct, exactly. 22 THE COURT: And I think that's the way it 23 ought to be addressed, rather than saying you cannot 24 consider his subjective belief, because they can 25 consider his subjective belief because his subjective</p>
<p style="text-align: right;">Page 1555</p> <p>1 because she thought they were better qualified. But I 2 think we want to instruct the jury. 3 MR. CARTA: Your Honor I would just 4 comment on underlying assumption, that that was the 5 only testimony on that point. I do believe Kelton 6 Jones testified that he didn't go through each of the 7 positions, but you recall his testimony was that 8 somebody of Mr. Castelluccio's skill set and 9 background could perform any vice president position. 10 MR. FASMAN: But then, Judge, he tried to 11 get in -- Mark tried to get into each individual 12 position, and I raised the point, and you sustained my 13 objection that he wasn't there for that period of time 14 these positions were filled in May of -- the 15 announcement's made 2008 and he left in January 2007, 16 and you did sustain that objection. 17 I don't care whether, you know, if you 18 want to contend this, but I think the jury ought to be 19 told that subjective beliefs -- there ought to be 20 something on subjective belief. 21 MS. TRIOLO: Which charge is that? 22 MR. FASMAN: Our post trial number 4. 23 MS. TRIOLO: I'm looking at the charge on 24 your joint trial memo. 25 MR. FASMAN: No, it's a separate set, and</p>	<p style="text-align: right;">Page 1557</p> <p>1 belief is evidence, evidence in the form of testimony, 2 which is evidence. 3 Now, you would object, and I'd say, well, 4 the objection's overruled, it goes to weight, not 5 admissibility. And if you think that that's something 6 you want to address in your closing argument, I think 7 that there's nothing to preclude you from saying, and 8 ladies and gentlemen, remember when Mr. Castelluccio 9 said he was the best qualified or well qualified for 10 all of these seven positions, you have to remember 11 that that's his subjective belief, and the fact that 12 he believes it doesn't necessarily mean that it's so. 13 A lot of people believe they're qualified to do many 14 things, but that's just their opinion. I mean I think 15 that's the way to handle that. 16 MR. FASMAN: Well, Judge, I would just 17 say that we've cited a couple of cases on Plaintiff's 18 subjective belief, and I think the law's pretty 19 clear -- and I'm happy to argue it that way, but I 20 think the law is pretty clear that the Plaintiff's 21 subjective belief is not enough, is insufficient to 22 show pretext, and that's what these cases say, and 23 particularly D-Conn. They're both from this district. 24 THE COURT: Can you get anything, 25 anyplace more authoritative than that?</p>



<p style="text-align: right;">Page 1558</p> <p>1 MR. FASMAN: No. I was trying to get one 2 of your opinions, couldn't find it. I was searching. 3 THE COURT: I'm included in Westlaw 4 publishing company, that's from Smith, and they just, 5 goes right down to the oil burners. 6 Well, you know, what would you add to 7 this charge and where would you add it? 8 MR. FASMAN: I guess what I would say 9 is -- 10 MR. CARTA: Your Honor, apparently -- I'm 11 not assessing fault at all, but apparently we don't 12 have this, so if you have an extra copy, that would be 13 a big help. 14 MS. TRIOLO: Thank you. Sorry about 15 that. 16 THE COURT: The charging conference is 17 really easy when you don't give the parties the 18 charge. 19 MR. CARTA: I'm not blaming them. It 20 seems to me if counsel represents he sent it, I 21 completely believe that. 22 MR. FASMAN: We did. 23 MR. DUFFIELD: It should be in the 24 pretrial as well, but it's a different number 25 probably.</p>	<p style="text-align: right;">Page 1560</p> <p>1 you've got it on -- 2 THE COURT: I think he's making a copy 3 for them. 4 MR. FASMAN: So Your Honor, I would put a 5 sentence on the bottom of 8 that goes onto the top of 6 9, which says "The Plaintiff may prove through direct 7 evidence or through circumstantial evidence --" I 8 guess I would put it at the top there "-- Plaintiff's 9 subjective beliefs nor co-workers is proof of 10 discrimination." 11 MR. CARTA: Which one is this? 12 MR. FASMAN: 4. 13 MR. CARTA: 4, thank you. 14 THE COURT: So you put it right -- put a 15 sentence before "discrimination" and the substance of 16 that sentence would be "Plaintiff's subjective belief 17 he has been discriminated against alone is 18 insufficient," basically it? 19 MR. FASMAN: Yes, something like that. 20 "Plaintiff's subjective belief that he should not have 21 been terminated, nor the subjective belief of 22 co-workers, is proof of discrimination." That would, 23 I think, satisfy. 24 MS. TRIOLO: "Alone" is significant, 25 though.</p>
<p style="text-align: right;">Page 1559</p> <p>1 MS. TRIOLO: Why did you supplement it if 2 it was already in here? 3 MR. FASMAN: We took out some of the 4 pretrial. 5 No, with the expert one in the charge and 6 I changed a couple of them and added a few, added a 7 couple of them. But these were sent to you when I 8 delivered them to chambers, too. They were sent the 9 night before. 10 MS. TRIOLO: There might have been 11 something else. There was a draft charge that you 12 were discussing with the Court and we hadn't seen that 13 either, so I think some things are. 14 THE LAW CLERK: I know Mike and I were 15 given a copy from Mr. Fasman, but apart from that I 16 don't know if anyone else got a copy. 17 MR. DUFFIELD: Did you find it? 18 MS. TRIOLO: Yes, I did. Thank you. 19 MR. CARTA: So just so the record is 20 clear, yes, in fact we do have it. We received it. 21 MS. TRIOLO: No, this is from their joint 22 trial memorandum. They're saying it's the same as 23 what was here. This was filed in September. 24 MR. CARTA: Okay. 25 MR. FASMAN: I guess I would put it --</p>	<p style="text-align: right;">Page 1561</p> <p>1 MR. CARTA: I thought the Judge's 2 phrasing was balanced. 3 THE COURT: You can't have people 4 speculating and giving their opinions. 5 MR. CARTA: Can you help, again, you're 6 saying the sentence that ends paragraph 8 goes over to 7 page 9? 8 MR. FASMAN: Yeah, right before the word 9 "discrimination". 10 MR. CARTA: I see. So at the top of page 11 9. 12 THE COURT: Well, I haven't finished it 13 yet. Maybe I have -- is it okay to add a sentence at 14 the top of page 9 before "discrimination", before the 15 word "discrimination," and the sentence would be, 16 "Plaintiff's subjective belief alone is not 17 sufficient," and you would want "nor is the," you 18 know, "nor is the subjective belief of --" 19 MR. FASMAN: "Nor the subjective belief 20 of co-workers." 21 MR. CARTA: I'm sorry, subjective belief 22 of? 23 MR. FASMAN: Co-workers. 24 MR. CARTA: I'm not understanding the 25 sentence.</p>

<p style="text-align: right;">Page 1562</p> <p>1 MR. FASMAN: Is not proof of 2 discrimination. 3 MR. CARTA: Would you just read the whole 4 sentence to me? 5 THE COURT: It would be "Plaintiff's 6 subjective belief alone is not sufficient, and" I 7 guess Zack is suggesting we add, "nor is subjective 8 belief of co-workers." 9 MR. DUFFIELD: The second sentence in the 10 second paragraph. 11 MR. CARTA: I don't see the support for 12 that. Footnote 4 talks about evidence of plaintiff's 13 belief, claimant's subjective belief. I don't see 14 anything there that would support expanding that to 15 co-workers in the authority that you've cited. I 16 think the Judge addressed the precedent that you 17 identified. 18 THE COURT: Yeah, you know, I think I've 19 kept it tight, and I think that to expand it to other 20 people is just, you know, it's just asking for 21 trouble. I think your request, Mr. Fasman, is a good 22 one, and we've come up with language that pretty much 23 covers your objections initially made. Actually it's 24 my language where I modified your language, and I 25 inserted "alone," and I don't think we want to start</p>	<p style="text-align: right;">Page 1564</p> <p>1 things would have been different. And I think that's 2 what this implies. 3 MR. FASMAN: I'm fine to strike 40, 4 Judge. I don't have any trouble with that. 5 THE COURT: What sentence is that? 6 MR. FASMAN: That's right here. 7 MS. TRIOLO: Fourth from the bottom. 8 THE LAW CLERK: Sorry, what page? 9 MR. CARTA: 8. 10 THE COURT: So we're striking out "The 11 Plaintiff must prove by a preponderance of evidence 12 that the Defendant would not have terminated him had 13 he been younger than 40 and everything else had 14 remained the same." 15 MS. TRIOLO: I don't think -- we don't 16 need the whole sentence. 17 THE COURT: I think Mr. Fasman said he 18 has no objection. 19 MR. FASMAN: No, I think we need the 20 sentence, but I don't think we need to have "40". 21 MR. DUFFIELD: Right. 22 MR. FASMAN: That's clearly a right 23 instruction under the Age Act. 24 THE COURT: But we've got that in a 25 couple other places --</p>
<p style="text-align: right;">Page 1563</p> <p>1 talking about other witnesses, because I think it's 2 just asking for trouble. 3 MR. FASMAN: So what is your sentence 4 then? 5 THE COURT: It says "Plaintiff's 6 subjective belief alone is not sufficient." 7 MR. FASMAN: "To prove discrimination." 8 THE COURT: "To prove discrimination." 9 MR. FASMAN: Good, okay, we're fine with 10 that. 11 MR. CARTA: I am as well. 12 THE COURT: All right. That actually 13 makes it nicer, because it flows right into the next 14 sentence. 15 MS. TRIOLO: Your Honor, may I raise a 16 point on page 8 at the bottom of the page? 17 THE COURT: Sure. 18 MS. TRIOLO: The sentence that says "The 19 Plaintiff must prove by a preponderance of the 20 evidence that the Defendant would not have terminated 21 him had he been younger than 40 and everything else 22 remain the same." 23 The ADA protects employees from treatment 24 based on age, and protected group is 40, but the 25 plaintiff doesn't have to show that had he been 39</p>	<p style="text-align: right;">Page 1565</p> <p>1 MS. TRIOLO: That's what I thought. 2 THE COURT: -- in here, so let's revisit 3 this after we -- so -- 4 MR. FASMAN: There are 40 -- references 5 to 40 throughout, which is the classic charge under 6 the ADA, but I do think -- I mean I am pretty strongly 7 of the opinion that he's got to prove by a 8 preponderance that we wouldn't have terminated had he 9 been younger, had everything else been the same and he 10 had been younger. I don't care if you want to take 11 out the "40", but I think that that's the burden. 12 MS. TRIOLO: I think it's said elsewhere, 13 though, but -- 14 THE COURT: Would not have terminated him 15 but for his age. 16 MS. TRIOLO: Which we say right above it. 17 THE COURT: We do say that. 18 MR. FASMAN: But this is the classic 19 charge. 20 MS. TRIOLO: Well, not the "younger than 21 40" part. 22 MR. FASMAN: It's younger -- actually 23 "younger than 40" is the classic charge, but if you 24 want to take out -- 25 THE COURT: Does it say "younger than</p>

Page 1566	Page 1568
<p>1 40"?</p> <p>2 MS. TRIOLO: I've seen it in some Seventh</p> <p>3 Circuit cases. I didn't see it elsewhere. And I've</p> <p>4 seen it also criticized as being misleading because</p> <p>5 it -- it's based on age, not that you're older than</p> <p>6 40, but that it's based on age. You can be 55, you</p> <p>7 can be 42, you don't have to show that you're younger</p> <p>8 than 40, that it would have been different had you</p> <p>9 been younger than 40, just that your treatment was</p> <p>10 based on age.</p> <p>11 MR. FASMAN: Right, that's why I said</p> <p>12 that 40, that's the criticism in the case law.</p> <p>13 MS. TRIOLO: Right.</p> <p>14 MR. FASMAN: The use of the 40, but not</p> <p>15 the actual concept that says that the plaintiff has to</p> <p>16 prove.</p> <p>17 MS. TRIOLO: Right, I don't think we're</p> <p>18 arguing that.</p> <p>19 MR. FASMAN: No.</p> <p>20 MS. TRIOLO: I think we're saying it was</p> <p>21 already said in that paragraph.</p> <p>22 MR. FASMAN: But that sentence, that's</p> <p>23 the classic sentence in there, and that is the burden.</p> <p>24 THE COURT: When I read that I thought</p> <p>25 that was kind of awkward. And I still do think it's</p>	<p>1 alternative phrases, but this is the classic one. I</p> <p>2 know that there are -- these are -- all three of these</p> <p>3 are from cases.</p> <p>4 THE COURT: Well, if you can represent</p> <p>5 that on the basis of your experience in this area this</p> <p>6 is what the case law -- I mean not the 40 part?</p> <p>7 MR. FASMAN: No, we can strike out 40,</p> <p>8 I'm fine, but I think the sentence should be in there.</p> <p>9 THE COURT: So what do we strike out?</p> <p>10 MR. DUFFIELD: The words "than 40."</p> <p>11 MS. TRIOLO: So the sentence would read,</p> <p>12 "The Plaintiff must prove by a preponderance of</p> <p>13 evidence that the Defendant would not have terminated</p> <p>14 him had he been younger and everything else had</p> <p>15 remained the same." So we strike two words.</p> <p>16 THE COURT: Just "than 40."</p> <p>17 MR. FASMAN: Yes.</p> <p>18 THE COURT: I'm going to do that. I</p> <p>19 think the sentence is, you know, it's about the third</p> <p>20 time in the same paragraph that we've said the same</p> <p>21 thing, only this is -- seems to be rather awkward with</p> <p>22 the word, or the words, rather, "than 40" included.</p> <p>23 And I remember looking at that and thinking about it,</p> <p>24 and then going on.</p> <p>25 Okay. So, your request is granted and</p>
Page 1567	Page 1569
<p>1 awkward. But you say that's the --</p> <p>2 MR. FASMAN: That's the classic one in</p> <p>3 every case.</p> <p>4 MR. CARTA: Your Honor, if you go up two</p> <p>5 sentences it's very clear, it's right there.</p> <p>6 THE COURT: "In other words, you must</p> <p>7 prove that age was the but-for cause of the</p> <p>8 termination rather than just a contributing or</p> <p>9 motivating factor."</p> <p>10 MR. CARTA: And the sentence even both</p> <p>11 that.</p> <p>12 THE COURT: "Plaintiff must prove by a</p> <p>13 preponderance of evidence that Defendant would not</p> <p>14 have terminated him."</p> <p>15 MR. CARTA: Above that, "In order for</p> <p>16 Plaintiff to succeed on his ADA claim he must prove by</p> <p>17 a preponderance of evidence that the Defendant</p> <p>18 terminated his employment because of his age. In</p> <p>19 other words, he must prove that age was the, quote,</p> <p>20 but-for, end quote, cause of the termination rather</p> <p>21 than just a contributing motivating factor."</p> <p>22 MR. FOX: The reason for 40, you use 40</p> <p>23 probably as the standard so you're not terminating</p> <p>24 them for being too young, right?</p> <p>25 MR. FASMAN: I agree that these are all</p>	<p>1 we've taken out "than 40".</p> <p>2 MS. TRIOLO: Thank you.</p> <p>3 MR. FASMAN: Judge, I had two more things</p> <p>4 I wanted to bring to your attention. And they're both</p> <p>5 based on things that happened during the case.</p> <p>6 One of them is the question of stray</p> <p>7 remarks. You may recall that at the start of the case</p> <p>8 I objected to the entry of Joanne Collins-Smee's</p> <p>9 comments, and I said -- about retirement, and I said</p> <p>10 there was stray remarks, and you said yeah, but that's</p> <p>11 for the jury to determine, I'm not going to rule them</p> <p>12 out, and I said fine.</p> <p>13 That is what happened, and that's how it</p> <p>14 came in, and I'm fine with that, but I think that it's</p> <p>15 quite common in cases like this to have an instruction</p> <p>16 on stray remarks, and particularly -- and here's the</p> <p>17 one that I -- you know, we could do a whole nine yards</p> <p>18 on stray remarks, but here's the one that I'm</p> <p>19 concerned about.</p> <p>20 I don't want the jury to be of the</p> <p>21 misimpression that any discussion of retirement is</p> <p>22 somehow unlawful, and they haven't read Raskin versus</p> <p>23 Wyatt, and the law in this circuit is very, very clear</p> <p>24 that inquiries about retirement are not evidence of</p> <p>25 age discrimination, and I think unless we tell them</p>

<p style="text-align: right;">Page 1570</p> <p>1 that, particularly because Kelton Jones said, well, I  2 would never inquire into retirement, I think they have  3 to be told. They're not going to know this. So we  4 can talk about stray remarks, or whatever, but I think  5 that's the nut of what I'd love to -- what I think is  6 required and what I think IBM wants in the  7 instructions. And it could be as simple as a sentence  8 which we have, inquires about retirement are not  9 evidence of age discrimination, and I'll expand on it  10 in my argument.</p> <p>11 THE COURT: Mere inquiries about  12 retirement do not alone constitute age discrimination.</p> <p>13 MS. TRIOLO: Your Honor, we don't feel  14 that they are stray remarks.</p> <p>15 THE COURT: Here's the thing here. If  16 there were a case where we had a witness saying, you  17 know, I did say that, I did say, you know, that, but  18 obviously I think at this point you could say wait a  19 minute, over a long period of time this raising of  20 this subject, I mean that's a stray remark. Here the  21 testimony of Ms. Collins-Smee is, did you say that,  22 and she wasn't just no, it was absolutely not, I  23 didn't say it, and to each question put to her I think  24 by Mark and by you, Zack, she unequivocally denied  25 making those statements. So now I'm telling the jury,</p>	<p style="text-align: right;">Page 1572</p> <p>1 discrimination claim.</p> <p>2 MR. FASMAN: Because they were done  3 multiple times.</p> <p>4 MS. TRIOLO: Right. So we'd have to give  5 the jury an additional instruction to let them know  6 how they can take on additional meaning in certain  7 circumstances. We can't have a broad sweeping  8 statement that says that they're not evidence of  9 discrimination.</p> <p>10 MR. CARTA: That's the problem, once you  11 start fiddling, you can throw things out of balance.</p> <p>12 MR. FASMAN: Well, no question, but I  13 think that unless we tell them that it's not improper  14 for an employer to inquire about retirement -- that's  15 really the concept -- unless we tell them that, I  16 don't want them sitting there and saying, any talk  17 about retirement is unlawful.</p> <p>18 MR. CARTA: But that's not true. In some  19 circumstances it is improper.</p> <p>20 MR. FASMAN: You didn't hear what I said.  21 I said any, I don't want them to think that any  22 discussion of retirement is unlawful. That's the  23 concept.</p> <p>24 MR. CARTA: You mean the concept that not  25 all references to retirement.</p>
<p style="text-align: right;">Page 1571</p> <p>1 but if you find that she did make the statements, they  2 are stray remarks.</p> <p>3 MR. FASMAN: No, no, no, no. I took  4 that -- you know, we did not do that, but they're not  5 proof, and you said it when you rephrased it, they're  6 not -- standing alone they're not proof of age  7 discrimination.</p> <p>8 I mean the two sentences -- let me read  9 you the two sentences that are the heart of this. I'm  10 not going to argue about --</p> <p>11 MR. CARTA: Where are they again?</p> <p>12 MR. DUFFIELD: Stray marks, 1. It's on  13 page 6.</p> <p>14 MR. FASMAN: I hope these are the same  15 ones, but here's the concept. "Inquiries about  16 retirement --" and I, you know, this is our phrasing.  17 We can fiddle with this. "Inquiries about retirement  18 are not evidence of age discrimination. You may not  19 rely upon them as proof of age discrimination. It is  20 not improper for an employer or supervisor to inquire  21 as to its employee's plans for the future," period. I  22 mean I think that's as neutral as I can get it.</p> <p>23 MS. TRIOLO: I think it's overly broad.  24 I'm fairly certain in the Tomassi case they found the  25 references to retirement were a basis for the</p>	<p style="text-align: right;">Page 1573</p> <p>1 MR. FASMAN: Or inquiries.</p> <p>2 MS. TRIOLO: So in certain circumstances  3 it could be and in others it might not.</p> <p>4 MR. FASMAN: Well --</p> <p>5 MR. CARTA: That's balanced. Not all  6 inquiries. Is that the word you wanted, not all  7 inquiries?</p> <p>8 MR. FASMAN: About its employee's plans  9 for retirement.</p> <p>10 MR. FOX: Not all references to  11 retirement.</p> <p>12 MR. FASMAN: Or not all references to  13 retirement, whatever.</p> <p>14 MR. CARTA: I think that makes sense.  15 Necessarily, what would you say, are necessarily  16 evidence of discrimination.</p> <p>17 MR. FASMAN: Okay.</p> <p>18 MR. CARTA: Are necessarily evidence of  19 age discrimination.</p> <p>20 MR. FASMAN: Okay.</p> <p>21 THE COURT: Did you say are not  22 necessarily evidence?</p> <p>23 MR. FASMAN: Of age discrimination.</p> <p>24 MR. CARTA: And then the jury decides  25 whether this is a reference that qualifies or not.</p>

<p style="text-align: right;">Page 1574</p> <p>1 MS. TRIOLO: Do you know where we're 2 putting it? 3 THE COURT: Wait a minute, I've got this 4 right down under "other instructions." I'm going to 5 add -- written here is, "An inquiry about retirement 6 is not necessarily evidence of age discrimination." 7 That's not the exact words of either side, but it's 8 pretty close to it. "An inquiry about retirement is 9 not necessarily evidence of age discrimination." 10 MR. FASMAN: We can live with that. 11 MR. CARTA: Yes, Your Honor. And where 12 are we putting that? 13 THE COURT: Page 9. 14 MR. CARTA: The first sentence under 15 "other instructions"? 16 THE COURT: No. 17 MS. TRIOLO: Right above it. 18 MR. CARTA: Oh, above it. 19 THE COURT: So you got some more tabs 20 there? 21 MR. FASMAN: I have one more, Judge. I 22 have a couple more, but I think, you know, in the 23 spirit of getting this done, here's the other subject 24 I would bring up with Your Honor, and that is, Mark 25 and Margaret have made and have actually shown the</p>	<p style="text-align: right;">Page 1576</p> <p>1 with you. 2 MR. FASMAN: Well, they are multiple and 3 true because -- they're multiple and true because we 4 pulled him out of those positions for performance, we 5 put him on the bench and then he never found a job, 6 and those are both true and they're both related, 7 they're both related in the sequence of events here. 8 MR. CARTA: Keith Holmes said they were 9 not related. 10 MR. FASMAN: Well, you can argue that. 11 MR. DUFFIELD: I think the charge -- 12 MR. FASMAN: He said they were indirectly 13 related. I was surprised. 14 MR. CARTA: I could tell you were 15 surprised. We've all been there. What, didn't I meet 16 with you? I saw that, thought oh boy, I've had that 17 happen to me. 18 MR. DUFFIELD: It's very balanced, and it 19 does say when an employer offers multiple reasons for 20 the same action, a jury is entitled to infer that 21 neither reason is accurate and the true reason is 22 discrimination, which is your position, and then ours 23 is, however, where the true reasons are factually true 24 or where the true reasons are related -- 25 MR. FASMAN: It would not be true.</p>
<p style="text-align: right;">Page 1575</p> <p>1 jury -- they made the argument, we had shifting 2 reasons for this decision, and they've shown the jury 3 a demonstrative along these lines. 4 There's case law -- and I've cited it in 5 our proposed instruction, which is number 10, post 6 trial instruction number 10 -- that says that where 7 the reasons are related and they're true, it's not 8 evidence of employment discrimination. So I tried to 9 phrase something that was more or less neutral. 10 I'm afraid that if we don't tell them, 11 it's really a qualification on that, you know, you've 12 made -- you made the point, and it's a fair point, 13 that if there are multiple reasons, you can infer 14 discrimination, but I think there's a qualification to 15 that, which says that if they're true, and they're 16 related, that's not the case. 17 Those are the cases that we've cited, and 18 we've cited three from the Second Circuit on that 19 point. 20 MS. TRIOLO: I think the difference is 21 that we're talking about conflicting reasons as 22 opposed to multiple reasons. We're saying that yours 23 were different at different times, which would give 24 rise to drawing an inference of discrimination, 25 whereas if they are multiple and true, then I agree</p>	<p style="text-align: right;">Page 1577</p> <p>1 MR. DUFFIELD: -- it would not be true. 2 THE COURT: Okay, I've read 13, and I 3 have no problem whatsoever with 13. The only thing I 4 would do, I would add the word "simply" in the last 5 sentence. "If you find that this is the case, you 6 should not infer discriminatory intent simply because 7 the employer has come forward with two related 8 reasons." 9 MR. FASMAN: We're fine with that. 10 MR. CARTA: You're looking at 13? 11 MR. DUFFIELD: Page 13. 12 MS. TRIOLO: Oh, okay. 13 THE COURT: Page 13. 14 MR. CARTA: I see it. So you're adding 15 something here. 16 THE COURT: Just inserting the word 17 "simply". 18 MR. CARTA: Where are we starting? 19 MR. FASMAN: The top, the whole thing. 20 MS. TRIOLO: Can I suggest that -- see 21 the first sentence with "Plaintiff claims that IBM has 22 offered two different reasons for termination." Can 23 we repeat "different" instead of "multiple" in the 24 second sentence? "When an employer offers different 25 reasons for the same actions a jury is entitled to</p>



<p style="text-align: right;">Page 1578</p> <p>1 infer."</p> <p>2 THE COURT: I think that makes sense.</p> <p>3 MR. FASMAN: Fine.</p> <p>4 THE COURT: It's the same, yes, makes it</p> <p>5 more readable.</p> <p>6 MR. FASMAN: Okay.</p> <p>7 THE COURT: All right. So this --</p> <p>8 MS. TRIOLO: "Multiple" becomes</p> <p>9 "different".</p> <p>10 THE COURT: Okay. Mike, Jake, do you</p> <p>11 know where we're going to put this?</p> <p>12 THE LAW CLERK: I think we could just put</p> <p>13 the instruction on page 13, just somewhere under the</p> <p>14 "other instructions" heading.</p> <p>15 THE COURT: Both sides okay with that?</p> <p>16 MR. DUFFIELD: Yes.</p> <p>17 MR. CARTA: I'm sorry, I was reading.</p> <p>18 THE LAW CLERK: The instruction that we</p> <p>19 just went over on page 13 in IBM's proposed</p> <p>20 instructions, I think Mike and I are inclined to just</p> <p>21 put it anywhere under the "other instructions" heading</p> <p>22 of the instructions that we've prepared.</p> <p>23 THE COURT: Where's the other</p> <p>24 instructions?</p> <p>25 MS. TRIOLO: Starts on page 9.</p>	<p style="text-align: right;">Page 1580</p> <p>1 MR. FASMAN: I was reading. I'm trying</p> <p>2 to figure that out, Judge. I got -- I have one on</p> <p>3 mitigation, but I'm not sure why I put it there. I</p> <p>4 think it's okay. Todd, do you want to see to this?</p> <p>5 MR. DUFFIELD: Sure. The charge that we</p> <p>6 propose on alternative employment, that he has a duty</p> <p>7 to seek -- to secure alternative employment, page 24,</p> <p>8 and it's charge number 17.</p> <p>9 The crux is that if jury finds Mr.</p> <p>10 Castelluccio did not conduct a reasonable job search</p> <p>11 or conduct a search and did not go to all lengths</p> <p>12 reasonably calculated to lead to a secure a new job,</p> <p>13 then they must deny him recovery for those damages</p> <p>14 that he could have avoided if he had gone to the</p> <p>15 appropriate lengths.</p> <p>16 THE COURT: And you propose to --</p> <p>17 MR. FASMAN: Well, you have a sentence in</p> <p>18 this on --</p> <p>19 MR. CARTA: I think that's covered.</p> <p>20 MR. FASMAN: -- page 13, that says "This</p> <p>21 includes the obligation to seek and accept other</p> <p>22 suitable positions which may have been available and</p> <p>23 which, using reasonable efforts, he could have</p> <p>24 discovered."</p> <p>25 Is there some phrase you would add to</p>
<p style="text-align: right;">Page 1579</p> <p>1 THE LAW CLERK: Starts on page 9.</p> <p>2 THE COURT: Okay. I would suggest that</p> <p>3 we put this in on page 11. By creating -- I mean just</p> <p>4 duplicating with the words we have here, above</p> <p>5 "finally," and then, you know...</p> <p>6 Okay. Do you have that, Mike?</p> <p>7 THE LAW CLERK: Yes, and we'll make a new</p> <p>8 paragraph for the open door investigation instruction.</p> <p>9 THE COURT: Okay.</p> <p>10 MS. TRIOLO: On page 10, do we all agree</p> <p>11 that "approximately" should be "at least" consistent</p> <p>12 with the charges we've read to the jury? Didn't we</p> <p>13 change it at the last minute?</p> <p>14 MR. FASMAN: Yes.</p> <p>15 THE COURT: Page 10, the second --</p> <p>16 MS. TRIOLO: The second paragraph at page</p> <p>17 10.</p> <p>18 MR. CARTA: "They were at least."</p> <p>19 THE COURT: Yes, "at least 116, 106."</p> <p>20 MR. FASMAN: Yes.</p> <p>21 THE COURT: Whereabouts is that?</p> <p>22 MS. TRIOLO: The end of the first</p> <p>23 sentence of the second paragraph.</p> <p>24 THE COURT: Okay. Thank you.</p> <p>25 Now, Zack, do you have any more tabs?</p>	<p style="text-align: right;">Page 1581</p> <p>1 that? I'm fine with that sentence. That's why I was</p> <p>2 trying to figure out why I had the flag there.</p> <p>3 MR. DUFFIELD: Maybe I read through this</p> <p>4 too quickly, maybe. This might cover it.</p> <p>5 MR. FASMAN: Yeah, I think we're fine</p> <p>6 with that, Judge. I think let's -- we'll withdraw</p> <p>7 that. That's fine.</p> <p>8 MR. CARTA: Did we have a discussion</p> <p>9 about the word "suitable"?</p> <p>10 MS. TRIOLO: I don't think so.</p> <p>11 MR. CARTA: I think you mentioned you</p> <p>12 wanted to clarify that.</p> <p>13 MS. TRIOLO: "To the extent the plaintiff</p> <p>14 is not required to accept a position that's not</p> <p>15 comparable to his current position or to accept a</p> <p>16 demotion," so we just wanted to make sure that that</p> <p>17 was clear.</p> <p>18 I mean, you know, we've heard a lot of</p> <p>19 evidence about Band 10 positions, and we feel that the</p> <p>20 jury might imply that he was obligated to take that if</p> <p>21 it were available to him, but the law on mitigation is</p> <p>22 otherwise, it is not obligated to accept, or accept a</p> <p>23 lower less suitable position or something that's a</p> <p>24 demotion.</p> <p>25 THE COURT: Do you have alternative</p>

<p style="text-align: right;">Page 1582</p> <p>1 phraseology?</p> <p>2 MS. TRIOLO: Well, we could add language</p> <p>3 that says that the plaintiff is not required to accept</p> <p>4 a position -- I can pull it from the case.</p> <p>5 THE COURT: This man was desperate.</p> <p>6 MR. CARTA: Sure was.</p> <p>7 THE COURT: This man was -- he was</p> <p>8 willing to go to Manila. Manila is noted for a lot of</p> <p>9 things, one of which is spiders that are about this</p> <p>10 big, so when we go to Japan, spend a few days in</p> <p>11 Manila, forget it.</p> <p>12 MR. FASMAN: I've been there. Birds</p> <p>13 birds birds.</p> <p>14 MS. TRIOLO: Your Honor, Brewer proposes</p> <p>15 along these lines, the Sharkey case, the language that</p> <p>16 talks about the plaintiff's obligation with regard to</p> <p>17 alternate positions.</p> <p>18 MR. FASMAN: Going into another line of</p> <p>19 work. I think the "suitable positions" is fine. I</p> <p>20 mean you could argue it. You could stand up and say</p> <p>21 the law is that he's not required to go into an</p> <p>22 alternative form of work, et cetera. Suitable seems</p> <p>23 to me to get there for both of us.</p> <p>24 THE COURT: You know, that's interesting.</p> <p>25 I mean I have no problem with that, but there are a</p>	<p style="text-align: right;">Page 1584</p> <p>1 understand a little bit more about what the court --</p> <p>2 what the Second Circuit has defined as a suitable</p> <p>3 position.</p> <p>4 THE COURT: Why don't we take "demeaning"</p> <p>5 out of there.</p> <p>6 MR. CARTA: That's what we're trying to</p> <p>7 write right now, and Margaret could read it to you in</p> <p>8 a second.</p> <p>9 MS. TRIOLO: I'm wondering whether --</p> <p>10 "Plaintiff need not accept employment that is not</p> <p>11 comparable to his previous position." We can keep it</p> <p>12 at that or --</p> <p>13 THE COURT: What about "reasonably</p> <p>14 comparable"?</p> <p>15 MR. CARTA: I think that's even simpler.</p> <p>16 Read that again.</p> <p>17 MS. TRIOLO: "Plaintiff need not accept</p> <p>18 employment that is not comparable to his previous</p> <p>19 position."</p> <p>20 MR. FASMAN: I'd like "reasonably</p> <p>21 comparable."</p> <p>22 MS. TRIOLO: The case law says "not</p> <p>23 comparable," but --</p> <p>24 MR. CARTA: Listen, the jury's not going</p> <p>25 to distinguish the difference between reasonably</p>
<p style="text-align: right;">Page 1583</p> <p>1 lot of people out there who are unemployed, and who</p> <p>2 would take anything to bring a paycheck home, to feed</p> <p>3 the kids, to pay the mortgage, and they would happily</p> <p>4 take a job that's demeaning. Now, do you want to have</p> <p>5 your client saying, you know, I want a comparable job,</p> <p>6 but I don't want to do anything demeaning? Do you</p> <p>7 want to have demeaning come out of his mouth? I mean</p> <p>8 nobody -- that didn't come up at all.</p> <p>9 MS. TRIOLO: No.</p> <p>10 THE COURT: I mean you see them on --</p> <p>11 MR. FOX: I'm a Band 10. Whether this is</p> <p>12 demeaning I don't know, but I think not.</p> <p>13 THE COURT: Look, I heard Mr. Crawford</p> <p>14 say that a Band 10 tops out at 350, 385.</p> <p>15 MR. DUFFIELD: 395.</p> <p>16 MR. FASMAN: That was Mr. Holmes. That's</p> <p>17 the point. I mean, you know, we can argue about</p> <p>18 whether it's suitable, but I don't want to get into,</p> <p>19 well, this is a demotion. It is what it is.</p> <p>20 MR. CARTA: I mean I hear the wisdom of</p> <p>21 what the Judge is suggesting, which is that it could</p> <p>22 be a double-edged sword, and I probably wouldn't be</p> <p>23 concerned about it, but for the fact that there was so</p> <p>24 much stress on the idea that he should consider a 10</p> <p>25 position. I mean I think the jurors need to</p>	<p style="text-align: right;">Page 1585</p> <p>1 comparable and comparable. I think reasonably</p> <p>2 comparable is a fair compromise. I think that's fine.</p> <p>3 MR. FASMAN: But this would be in</p> <p>4 addition to this sentence, right?</p> <p>5 MS. TRIOLO: Yes. So we could put it</p> <p>6 right before "unlike" -- I'm not going to have the</p> <p>7 right page.</p> <p>8 MR. FASMAN: 13, right above the bold</p> <p>9 "defendant's burden," there's a sentence that begins</p> <p>10 with "unlike." So before that. So let's see what we</p> <p>11 have here. "This includes the obligation to seek and</p> <p>12 accept other suitable positions which may have been</p> <p>13 available and which, using reasonable efforts, he</p> <p>14 could have discovered," and then we would insert --</p> <p>15 void the word "unlike."</p> <p>16 MS. TRIOLO: "Plaintiff need not accept."</p> <p>17 THE COURT: It should say "A plaintiff</p> <p>18 need not accept."</p> <p>19 MS. TRIOLO: "Employment that is not</p> <p>20 reasonably comparable to his previous position."</p> <p>21 THE COURT: So that gives you the</p> <p>22 alternative employment instruction, and we've got a</p> <p>23 few tweaks here to make it more palatable.</p> <p>24 MR. CARTA: Your Honor, I have one more</p> <p>25 issue to raise, and it's a difficult issue. Counsel</p>

<p style="text-align: right;">Page 1586</p> <p>1 and I really have worked to try to get this resolved.  2 It has to do with the deductibility of pensions.  3 And ultimately it comes down to a  4 question, I think, of who has the burden of proof. I  5 have seen cases go both ways on whether pension should  6 be deducted. I think that the authority in the Second  7 Circuit does lean towards having them be deducted, but  8 if you read those cases, what you see is that what  9 they're deducting is the incremental benefit -- I  10 think that's the word -- benefit to the employer -- to  11 the employee by virtue of the fact that they're let go  12 earlier.  13 So that there's some delta, there's some  14 difference between what they would have got had they  15 worked to the end and what they actually got, and  16 that's sort of considered a windfall, because why  17 should they get more than they otherwise would have,  18 and it's that delta, that difference that's deducted.  19 In this particular case there isn't any  20 evidence of the delta. I can explain the practical  21 reason for that, is because we couldn't find that out.  22 I'm not blaming anybody for it, but we couldn't find  23 that out. That's information that's uniquely within  24 IBM's scope of knowledge.  25 And I think what we're talking about is a</p>	<p style="text-align: right;">Page 1588</p> <p>1 So I mean, I have an alternate suggestion  2 in terms of how to phrase this, but I do think it's  3 not a question of word-smithing. It's really a  4 question of law. And I wish I had a more decisive  5 authority I could point the Court to, but I've given  6 you what I think is the correct position.  7 MR. FASMAN: Your Honor, if I may, the  8 cases that we sent to you say very clearly that if you  9 are terminated and you receive back pay, pensions come  10 off, because you can't work and receive a pension. It  11 doesn't make the employee whole, it's a double-dip.  12 That's very clear.  13 What Mr. Carta talking about is something  14 entirely different, and it's not a setoff. We don't  15 have to prove it. It's just logical. Economic  16 damages don't include money he wouldn't have gotten,  17 just as, you know, alternative employment, if he went  18 out and worked somewhere else, you take that off, too.  19 MR. CARTA: But there's no -- I'm sorry,  20 Zack.  21 MR. FASMAN: But there's, you know, the  22 second question that Mr. Carta raised that we haven't  23 been able to agree on is something slightly different,  24 which is, what if he had continued in employment until  25 65 or 66, whether his pension would be higher, and</p>
<p style="text-align: right;">Page 1587</p> <p>1 mitigating factor, in the same way that they just put  2 on the testimony of Dr. Sodikoff, which is that money  3 should be deducted because he didn't work hard enough  4 to find a job, this is a mitigating factor. It's a  5 setoff. It's he lost X dollars but there's a setoff  6 of Y dollars.  7 And my sense is that the burden is on the  8 Defendant to establish what those Y dollars are. I  9 will be completely honest with you, and I explained  10 this to counsel, I haven't found any law that says  11 that. Every case that I read -- and I was up very  12 late one night reading everything I could put my hands  13 on -- says -- just says there was a difference -- it  14 says there's a difference between what the person got  15 and what they would have gotten, and we're going to  16 deduct that. It doesn't say who put that evidence in.  17 So I can't represent to the Court that  18 yes, here's a case that says that it's their burden,  19 but it seems to me extremely logical that if it's an  20 element of a setoff, that -- I'm not even sure it was  21 pled, to tell you the truth. We looked through the  22 special defenses, and although there were, I don't  23 know, 23 special defenses, or something, I didn't see  24 anything like that. But regardless, assuming it was  25 pled, I do think the burden is on them.</p>	<p style="text-align: right;">Page 1589</p> <p>1 that's a different question. That's a question that I  2 think is a damage question. That's like saying he  3 would have gotten extra fringe benefits, he would have  4 gotten another three weeks of vacation, or what have  5 you, or he would have gotten some more money. That's  6 a damage issue. And Dr. Crakes even testified that he  7 didn't calculate that. But that's something that was,  8 it seems to me, that had to be pled and proven as to  9 this being uniquely in IBM's knowledge.  10 I went back and -- you're more than  11 welcome to these. I have a 30(b)6 notice from Ms.  12 Sherman that had ten paragraphs, none about pensions.  13 And we had multiple 30(b)6 depositions. I have a 65  14 page or a 68 paragraph request for production of  15 documents. We produced a hundred some thousand pages  16 of documents. I mean this isn't uniquely in our  17 bailiwick. He could have asked for them along with  18 everything else. I mean you got the kitchen sink. So  19 that's our position on this, Judge.  20 THE COURT: Well, you know what I'm  21 thinking. First of all, do I know the answer? No, I  22 don't. But what I think we're doing is on this  23 particular facet of the issue, I think we're drifting  24 into equity. I mean we've got questions of law that  25 have to be decided, but, you know, what is a setoff?</p>

<p style="text-align: right;">Page 1590</p> <p>1 Is a setoff an action in law, or is it an order by the 2 Court to disgorge, or is this something that could be 3 handled by the Court post verdict? That's question 4 number one. 5 Question number two, is this something 6 that could be answered by a -- could be resolved by 7 asking a question, a written question of the jury, on 8 the verdict form? 9 MR. CARTA: I think that's what actually 10 helps me understand that there was this difference of 11 opinion. Is that the Hagelthorn? 12 THE LAW CLERK: It's Sharkey. 13 MR. FASMAN: What is Sharkey saying? 14 THE LAW CLERK: I believe it says that -- 15 you know, I'll give everybody copies, although now I 16 don't have a copy, but the highlighted, I think on the 17 left column may answer the Judge's first question. 18 THE COURT: Yeah, it's appropriate for a 19 jury. 20 MR. FASMAN: Well, that's right. I think 21 that that's, you know -- I mean I think the law is 22 that pension benefits received ought to be deducted, 23 and if there's proof of lost pension benefits, and 24 there isn't in this case, because your guy didn't 25 calculate them, then he can't recover them. I mean I</p>	<p style="text-align: right;">Page 1592</p> <p>1 employer, right, at the same time?" And he said, 2 "Well, no, not from the same employer, but I did not 3 calculate the value of any reduced pension benefit 4 that Mr. Castelluccio experienced because of his 5 earlier retirement. The pension benefit that he would 6 have received at age 66 is greater than what he would 7 have received at age 61." 8 He said he didn't calculate it. And then 9 in my typical fashion I said, "Can you try to answer 10 my question?" 11 But I mean, he said he didn't calculate 12 it. 13 MR. CARTA: But he also said he believed 14 it was greater. That's the only testimony in the 15 record, is that he believed it was greater, which is 16 what I understand as well. 17 MR. FASMAN: The pension benefit, yeah, 18 well, if he worked to age 66. My answer to that is, I 19 would presume under a pension plan if he had another 20 five years in different stuff he might get another 21 benefit, but you didn't plead it, he didn't prove it. 22 THE COURT: Given this record you could 23 not say for certain whether the jury did or did not 24 include the value of Sharkey's lost pension benefits 25 in making its award. Was there any evidence</p>
<p style="text-align: right;">Page 1591</p> <p>1 think it's very simple. I think that's what Sharkey 2 says, actually. 3 MR. CARTA: It doesn't address the legal 4 issue. It talks about the fact that it might in some 5 instances be handled by handing it to the jury. 6 Judge, I mean I think your suggestion 7 makes some sense. Rather than telling the jurors 8 point blank that they have to deduct the amount of the 9 pension, it sounds to me like that's a legal issue and 10 we can brief it, and who has the burden. 11 MR. FASMAN: I think that's contrary to 12 Second Circuit. 13 THE COURT: Again, we want to finish this 14 case. I mean much as I like you guys, son of a gun, 15 you know, I had not read this, I had not read this and 16 I -- oh, Sharkey. 17 MR. CARTA: I mean the testimony, I 18 believe, of the expert, and what my client has told 19 me, is that there is a loss to him by virtue of the 20 fact that the payments he received when he was fired 21 are less per month, per year, than if he had worked to 22 the end. 23 MR. FASMAN: What your expert testified 24 to, here's his transcript, he said -- I asked him, 25 "You couldn't receive wages and pensions from the same</p>	<p style="text-align: right;">Page 1593</p> <p>1 introduced by either side of the value of Sharkey's 2 lost pension benefits? I don't recall any. 3 MR. CARTA: No, there wasn't, because, 4 again, my belief is that that's a setoff that has to 5 be established by IBM. I mean they chose not to call 6 an economist. I still don't understand that, but that 7 was their choice. I mean they could have called an 8 economist to offer contrary opinion to our economist, 9 but it's not our economist's job to prove what setoffs 10 were possible. 11 THE COURT: Okay. The Court goes on, "On 12 remand the district court should make a determination 13 whether the jury's award included the value of lost 14 pension benefits." 15 Can we solve this by asking a simple 16 question on the verdict form, in an appropriate place, 17 does this award include the value of lost pension 18 benefits? Yes, no. No. 19 MR. FASMAN: Don't do that. One, it's 20 confusing, but second of all, it needed to be -- there 21 needed to be evidence on that, and there was no 22 evidence presented on that by their expert. We were 23 not required to present evidence of his lost fringe 24 benefits. I mean that's throwing it entirely on us. 25 I mean I didn't prove lost wages, lost anything. I</p>

<p style="text-align: right;">Page 1594</p> <p>1 don't have to do that. And then, I mean, if you don't  2 plead it, you don't prove it, your expert doesn't  3 testify on it -- he had ample opportunity to do  4 that -- then it shouldn't go to the jury.  5 But the pension benefits should be  6 deducted on a double-dip theory, and we ought to tell  7 the jury that. We should deduct -- from any award you  8 should deduct the pension benefits that he received.  9 That's all. That's a separate question from the  10 lost --  11 MR. DUFFIELD: It's two separate issues.  12 One issue is does the value of the pension that he  13 did, in fact, receive get deducted from any back pay  14 award, and I think both parties agree that it does.  15 The issue is, the second issue, which is, if he would  16 have received more pension benefit because he had  17 stayed working for five or six years, what's the value  18 of that difference, and should he get a credit for  19 that difference, because he didn't receive it, and  20 that I think is your burden to prove if you claim  21 that's part of his damages, that he should have gotten  22 a greater pension that he did, in fact, receive,  23 that's your burden to prove what that difference is.  24 MR. FASMAN: I agree with that.  25 MR. DUFFIELD: The evidence of pension is</p>	<p style="text-align: right;">Page 1596</p> <p>1 confusing to them.  2 MR. CARTA: I agree.  3 THE COURT: Can we deal with this on a --  4 can we deal with this on a post verdict basis? I mean  5 it makes sense for us to deal with this on a post  6 verdict basis, because there might be a Defendant's  7 verdict, in which case we don't have to deal with it  8 at all. If there's a Plaintiff's verdict, then by  9 agreement the Court is -- you are allowing the Court  10 rather than a jury to resolve this, which Sharkey  11 seems to say is okay.  12 MR. CARTA: I think it's --  13 MR. DUFFIELD: If you play that out,  14 though, this is what's going to happen. They get a  15 Plaintiff's verdict for X amount of dollars, and then  16 you're going to have us brief the issue of what the  17 difference in the pension is, so we're having to brief  18 that he should get more money because he would have  19 gotten higher pension. That doesn't make sense. Why  20 would we be arguing that he should get more money? It  21 should be their burden to prove it. If it's their  22 burden, they should have done it during the case, and  23 they didn't present evidence on it. They shouldn't  24 get a second crack on it.  25 MR. FASMAN: That's how I come out on it.</p>
<p style="text-align: right;">Page 1595</p> <p>1 Mr. Castelluccio testified that he's receiving \$78,000  2 a year.  3 MR. CARTA: And I think you crossed Dr.  4 Crakes on an earlier calculation of his pension, and  5 put in a number of the total amount of pension. I  6 mean --  7 MR. DUFFIELD: Correct.  8 MR. CARTA: You did cross that issue, and  9 didn't get into the question of whether that was the  10 total incremental increase or whether that was just  11 the total amount.  12 MR. FASMAN: I just took his calculation,  13 which did not include -- in any of his studies he  14 didn't calculate lost pension benefits. He didn't try  15 to do it. That's -- if -- I mean I can't disprove --  16 I'm not going to go out and disprove when the --  17 MR. DUFFIELD: Fringe benefits.  18 MR. CARTA: I think it's set off.  19 THE COURT: There was no evidence of  20 that, of the amount of lost pension benefits  21 introduced.  22 MR. FASMAN: No, correct.  23 THE COURT: So a question to the jury is  24 really unfair, because they don't have any evidence  25 that they could have considered. It would be</p>	<p style="text-align: right;">Page 1597</p> <p>1 I think the overall question on pension deduction is  2 one that's very clear and that we should go forward  3 with, tell the jury, you know, you should deduct the  4 pension benefits, and then maybe Your Honor is right,  5 maybe we should meet -- we should see and then try to  6 resolve it. If you think that that's the law, we'll  7 brief that -- even though there's no proof in the  8 record -- I mean I think the right result is to say  9 there's no proof in the record, shouldn't go anywhere.  10 MR. CARTA: I'm not suggesting open up  11 the record because I absolutely agree that it's done,  12 we've been there. But I think there is this issue,  13 and Sharkey seems to suggest that, in fact, it is an  14 issue the Court can deal with, and I always think it  15 make sense not to jump hurdles that you don't need to  16 jump.  17 MR. DUFFIELD: So I'm still struggling  18 what's going to happen post verdict. We're going to  19 brief the issue of whose burden it is, and if the  20 Judge finds that it was our burden --  21 MR. CARTA: Yes.  22 MR. DUFFIELD: -- then what happens? We  23 didn't present evidence on it, so how does it affect  24 the verdict?  25 MR. CARTA: Then if the jury awarded the</p>



<p style="text-align: right;">Page 1598</p> <p>1 pension, then he's entitled to keep it. If it turns 2 out that it was our burden, then the Judge would 3 deduct it. 4 MR. FASMAN: No, no. 5 MR. DUFFIELD: So if you deduct the full 6 78,000 now even the incremental would have been only 7 \$3,000, possibly, each year? That seems like a pretty 8 big hammer from such a little issue. 9 THE COURT: If we just avoid mentioning 10 this to the jury, we got a 50/50 chance that 11 everything's going to be all right, because -- 12 MR. FOX: All right for some, depending 13 on which side of the table you're sitting on. 14 THE COURT: It's only if we have a 15 Plaintiff's verdict that we've got to take and get 16 into this. And I mean how can we ask the jury if they 17 have subtracted Plaintiff's benefit when all of us 18 here acknowledge that there was no evidence of 19 Plaintiff's benefit, pension benefits introduced? 20 MR. FASMAN: There was evidence of the 21 Plaintiff's pension benefits. 22 THE COURT: Okay. What benefits are you 23 talking about deducting. 24 THE LAW CLERK: The delta. 25 MR. DUFFIELD: The delta.</p>	<p style="text-align: right;">Page 1600</p> <p>1 of time he would be entitled to some increment in his 2 pension benefit. That's all we're talking about, and 3 that's what -- that's where the disagreement is. 4 MR. FOX: There's no evidence that that 5 is actually the case under our plans before the Court. 6 MR. FASMAN: Correct, and there's no 7 evidence that that is the case. That was my whole 8 point. That Dr. Crakes didn't calculate that. It's 9 not -- I mean if there's no evidence, it's not our 10 burden. Mr. Carta wants to say it's our burden on 11 some setoff theory, but the fact is, the guy was 12 receiving and has been receiving 78 grand a year and 13 will forever. 14 MR. CARTA: Let's step back. I didn't 15 put on any evidence of his pension benefits in Dr. 16 Crakes's testimony, right? I mean that was not part 17 of my case. You brought that up as a mitigating 18 factor as a setoff. And my feeling is that that was 19 your obligation to go forward on that. 20 MR. FASMAN: And I proved that he was 21 getting, by his own admission, \$78,000 a year. Crakes 22 took that off in his prior study. And I think the law 23 is clear from the cases that we provided to the Court 24 that if you're getting -- you can't both work and be 25 retired, and if you're going to give him back wages,</p>
<p style="text-align: right;">Page 1599</p> <p>1 MR. FASMAN: I think the law is clear, 2 you got to take off his pension benefits from any back 3 pay award. You can't double-dip. And that was 4 78,000. 5 THE COURT: That was the amount, 78,000? 6 MR. DUFFIELD: That's what Mr. 7 Castelluccio testified to. 8 MR. CARTA: I'm sorry, my mind wandered 9 for a second. What did you say? 10 MR. DUFFIELD: Mr. Castelluccio testified 11 that the pension benefit he has been receiving is 12 \$78,000 a year. 13 MR. CARTA: Yes, right. 14 THE COURT: Every year. 15 MR. DUFFIELD: Correct, since he retired, 16 June of -- 17 THE COURT: And it's your position that's 18 what he's going to get forever. 19 MR. FASMAN: Sure. 20 THE COURT: And there's no delta. 21 MR. FASMAN: Well, the only delta would 22 come if the Plaintiffs prevail and the jury were to 23 find that he should have been employed to age 65 or 24 66, whenever it was that he was going to retire. Then 25 presumably under our plan by working that extra period</p>	<p style="text-align: right;">Page 1601</p> <p>1 deductions from the back wages include pension 2 benefits he wouldn't have gotten otherwise. I think 3 the rest is all double-dipping. 4 MR. CARTA: Again, just to repeat 5 myself -- 6 MR. FASMAN: He can't keep his pension 7 benefits and get \$300,000 a year in lost wages. That 8 basically says all right, so we're going to gift you 9 300 grand and you can keep the pension benefit, it's 10 380, but -- 11 MR. CARTA: The pension benefits is 12 something he earned. I mean he worked there for 40 13 years. That's something he earned totally 14 independently. And again, I think you're right, not 15 that all pensions get deducted, but that the 16 difference between what he would have gotten and what 17 he ultimately got, that's what's deductible. 18 MR. FASMAN: That's not that the law 19 says. 20 MR. DUFFIELD: That's not what the law 21 says. 22 MR. FASMAN: That's not what the cases 23 say. 24 MR. CARTA: Hagelthorn. 25 MS. TRIOLO: Hagelthorn.</p>

<p style="text-align: right;">Page 1602</p> <p>1 MR. CARTA: Hagelthorn is the Second 2 Circuit case that discusses this, and the Court may 3 remember it was a lump sum payment that the person 4 received and the Court said, well, he got a lump sum 5 payment of X plus Y dollars because he was forced out 6 sooner, he would have only got Y dollars if he had 7 gone to the end, and therefore the delta is what's 8 deductible. And the case is very clear on it. It's 9 just the delta that gets deducted, not the whole 10 pension. And I've seen other cases cite that decision 11 as if it were all the pension, I've seen those cases, 12 but the law -- 13 MR. FASMAN: Wait, this is just not 14 right. This has been the law in the Second Circuit 15 forever. 16 MR. CARTA: Read the case. 17 MR. FASMAN: Whittlesea versus Union 18 Carbide. It's always the same. Pensions are deducted 19 from back pay awards because otherwise it's 20 double-dipping. I mean I, you know, I wrote a brief 21 memo like a page memo and I Xeroxed the cases for the 22 Court. I mean they're very, very clear. The Second 23 Circuit -- even Mr. Carta said, well, I admit that the 24 law in this Circuit tends towards that. It doesn't 25 tend toward that. It is -- that's the law in this</p>	<p style="text-align: right;">Page 1604</p> <p>1 THE LAW CLERK: I can make copies if it's 2 easier. 3 MR. FASMAN: Just give us the cite, we'll 4 get copies. 5 MR. CARTA: It's 710, F2d, 76. 6 MR. FASMAN: What's the date? 7 MR. CARTA: 1983, Second Circuit. 8 Hagelthorn versus Kennecott Corporation. 9 THE COURT: Who ordered it? 10 MR. CARTA: Judge Lumbard. 11 MR. FOX: Judge, we're talking about two 12 facets. We're talking about whether or not we get to 13 offset the pension that was paid to him, and whether 14 or not the amount that he would have gotten had he 15 stayed employed should be deducted from that. But in 16 this case, although we are -- we've been discussing 17 this under the assumption that had he stayed until 65 18 he would have gotten more, there is no evidence in the 19 record to that effect regarding IBM's pension plan. 20 So we are operating under an assumption that he would 21 have gotten more, and it's very likely, we're all 22 familiar with it, we assume that's the case, but 23 there's no evidence in the record as to what IBM's 24 pension plan was and that he would have gotten more, 25 nor is there any evidence as to what that amount would</p>
<p style="text-align: right;">Page 1603</p> <p>1 Circuit, you deduct pensions. There are other 2 circumstance that do other things, but the law here is 3 very clear. 4 THE COURT: Well, that's my understanding 5 of the law, in this Circuit, and I think there's a 6 common sense rationale behind it. 7 Jake and Mike, have you read these 8 cases -- 9 THE LAW CLERK: Yes. 10 THE COURT: -- that Zack is talking 11 about? 12 THE LAW CLERK: Yes. My understanding 13 was -- I have not read Hagelthorn, and I'm happy to 14 get you a copy, Judge, if you want to. 15 MR. CARTA: I would ask for that, because 16 I think that is the leading case, and I think that 17 case makes it most clear that it's the difference, 18 it's the difference that is deductible, it's not the 19 entire pension. 20 MR. FASMAN: Can we get a copy of it? 21 H-E-G-E-L-T-H-O-R-N, I believe. 22 THE LAW CLERK: Second Circuit. 23 MR. CARTA: Wait a second. 24 MS. TRIOLO: Do you have a copy? 25 MR. CARTA: Yes.</p>	<p style="text-align: right;">Page 1605</p> <p>1 be. So it's two -- 2 THE COURT: What you just said is true. 3 I mean I find that that is true. Where does that take 4 us? 5 MR. FOX: I don't think there's evidence 6 to support subtracting any amount from the pension 7 benefit that has been identified that he received that 8 should be offset against the back pay award. 9 MR. FASMAN: And I have to say I think 10 Mr. Fox is right, this was all -- I mean it's not as 11 if we were stingy in our discovery. Plaintiff had 12 ample opportunity to prove this. They had an expert. 13 If the expert wanted to prove this he had ample 14 opportunity. 15 MR. FOX: The place to start looking is 16 our pension documents and what does the plan provide 17 and payout offerings. That stuff is available to 18 employees. He could have called the service there and 19 gotten that. 20 MR. CARTA: Your Honor, again, I don't 21 think that that's the point. I mean we're repeating 22 our positions, and I don't know that that advances the 23 ball in particular, but -- 24 MR. FASMAN: That's the cases I cited. 25 They're not all from '83. I don't have it all in</p>

<p style="text-align: right;">Page 1606</p> <p>1 front of me, but they're not all after '83, but there 2 are certainly a number of them after '83. 3 MR. CARTA: Your Honor, the discussion 4 appears starting on the bottom of page 8, I believe. 5 MR. FASMAN: Can we get a copy of that 6 before -- the Judge doesn't have it. 7 THE COURT: Where is that? 8 MR. CARTA: Starts under the heading of 9 "setoff," it goes up. 10 THE COURT: Okay, I've got it right here. 11 I think Mike is making copies for you right now, and 12 I'm just going to -- 13 MR. CARTA: May I be excused for a 14 second? 15 THE COURT: Sure. 16 MS. TRIOLO: Can I ask two things that 17 are easy things? 18 THE COURT: So we have evidence in the 19 record that he received \$73,000 a year in his pension? 20 MR. FASMAN: \$78,000. Every year it's 21 been the same. It's constant. 22 MR. FASMAN: That's what he testified. 23 MR. CARTA: And the testimony of the 24 expert who said that he believes it would have been -- 25 he would be receiving more than that in an annual</p>	<p style="text-align: right;">Page 1608</p> <p>1 MR. CARTA: I'm not saying he calculated 2 it. I never said that. 3 MR. FASMAN: But there's no evidence that 4 he reviewed the pension plan. He admitted he did not. 5 He admitted he made no inquiry. You didn't get the 6 pension plan to him. There's no evidence on this. He 7 never inquired about on it, and he never calculated 8 it. 9 MR. CARTA: Again, we're just repeating 10 positions, but I think that's a setoff, and I think 11 the burden is on IBM to establish what should be set 12 off against damages. I mean it would be like if I 13 didn't put in any evidence on the pension, you could 14 say the whole calculation should be thrown out. 15 That's not my burden to establish setoffs, and you're 16 claiming the pension is a setoff. 17 MR. FOX: If you didn't put in evidence 18 on another element of damages, then it wouldn't be. 19 That's an element of damages that we're talking about. 20 MR. CARTA: No, it's a setoff. 21 MR. FASMAN: He's calling it a setoff. 22 MR. DUFFIELD: But you're relying on the 23 Hagelthorn case for your position that it's our burden 24 to prove the setoff. 25 MR. CARTA: I am not, no. I think I said</p>
<p style="text-align: right;">Page 1607</p> <p>1 basis if he had worked until the end of his 65th year. 2 MR. FOX: That was not specific to the 3 IBM pension plan, which he didn't review in making his 4 calculation. 5 MR. FASMAN: Right. He said it was 6 speculation, and he said "I didn't calculate this." 7 What he said was "I didn't calculate this." It was a 8 parenthetical, "I also did not calculate the value of 9 any reduced pension benefit that Mr. Castelluccio has 10 experienced because of his earlier retirement. The 11 pension benefit that he would have received at age 66 12 is greater than what he would have received at age 13 61." But he never got the pension plan. He never did 14 any of this. 15 MR. CARTA: But he did testify that not 16 any pension plan, but specifically his belief was that 17 IBM's pension plan. I mean that's what I heard you 18 just say. 19 MR. FASMAN: I will read it again. "I 20 also did not calculate the value of any reduced 21 pension plan that Mr. Castelluccio has experienced 22 because of his earlier retirement, the pension benefit 23 that he would have received at age 66 is greater than 24 what he actually received at age 61." But there's no 25 evidence --</p>	<p style="text-align: right;">Page 1609</p> <p>1 before I haven't found anything that addresses this. 2 I think I said that before. 3 MR. FASMAN: And what's very clear, 4 crystal clear from these cases, it would have to be 5 deducted. 6 MR. DUFFIELD: Because in Hagelthorn the 7 issue was that the lump sum payment resulted in him 8 getting more pension had he stayed, so there the 9 company was arguing that he had been paid more, so 10 there would be a setoff, because they were asking for 11 money back, which is the opposite of what you're 12 saying. You're saying he should be getting more money 13 because he would have earned more. 14 MR. CARTA: I'm saying that the setoff 15 should be less than the full amount that you've asked 16 to be set off, and that the -- 17 MR. FASMAN: We did not ask for anything 18 to be set off. It's a matter of law in this Circuit, 19 pension benefits come off of back pay. It's not a 20 setoff. And it doesn't matter if we had the burden or 21 not the burden. The record's clear that he's 22 receiving a pension benefit of \$78,000 a year. He 23 can't double-dip and take them both, if he wins. 24 MR. CARTA: I don't see it as 25 double-dipping. It is what he was entitled to. And</p>

<p style="text-align: right;">Page 1610</p> <p>1 again, Hagelthorn makes it clear that it's not all --  2 it's whatever incremental benefit he got.  3 MR. FASMAN: This is a totally unique  4 situation with a lump sum payment. That's not this  5 one.  6 MR. CARTA: I think that makes it more  7 clear what the difference is, is what's being  8 deducted. That's where he has a right to set off for.  9 MR. DUFFIELD: But you agree that he  10 wouldn't have been entitled to that \$78,000 for the  11 last four years if he was still working at IBM,  12 correct?  13 MR. CARTA: Correct.  14 MR. FASMAN: Right, so --  15 MR. CARTA: But when he did retire he  16 then would have been entitled to more than the 78.  17 MR. FASMAN: How do you know?  18 MR. FOX: That's the assumption, but  19 there's no evidence of that.  20 MR. FASMAN: How do you know? You don't  21 know.  22 MR. CARTA: That's what my client has  23 told me, and I don't recall what investigation Dr.  24 Crakes did into that, I really don't recall, but I  25 do --</p>	<p style="text-align: right;">Page 1612</p> <p>1 pension from the back pay award. That's the law in  2 this Circuit.  3 THE COURT: Well, I don't think that this  4 decision is particularly illuminating. I mean it  5 leaves us with Judge Lumbard dealing with rulings and  6 orders and a judgment entered by Judge Kerse after the  7 jury came in.  8 The way I look at this, this is a legal  9 issue that I think we are wasting our time trying to  10 settle in the abstract. There's a 50/50 chance that  11 we won't have to address this at all. For me to give  12 the charge as it stands, is -- unfortunately that  13 leaves us in a position where we have an award, and we  14 really don't know whether the \$73,000 going forward  15 and back is included in that award.  16 MR. FASMAN: We've actually -- I think  17 the answer is that we would know if we instructed them  18 as Your Honor's instructs, say these deductions  19 include pension benefits he received from IBM from the  20 date of the termination until the date he would have  21 retired and any wages you find he would have received  22 from other employment. I think that's your charge. I  23 think that's right.  24 MR. DUFFIELD: Page 13 of your charge.  25 MR. FASMAN: That's your charge, and</p>
<p style="text-align: right;">Page 1611</p> <p>1 MR. FASMAN: He did none that I can tell.  2 He did absolutely none. He took what you provided to  3 him and made --  4 MR. CARTA: We're dodging the issue. I  5 think you know that it's true that if you retire later  6 you get more on a monthly basis.  7 MR. FOX: I have not read the pension  8 plan. I would think that would be the case, but I  9 have not read it, because IBM's pension eligibility is  10 a matter of years of service with IBM, and age.  11 MR. CARTA: Right.  12 MR. FOX: And I don't know if that tops  13 out at some point. I don't know how that would impact  14 the pension payment. He started working at IBM at a  15 very young age. He had a lot of time served.  16 MR. CARTA: Sure, yes.  17 MR. FOX: So I don't know if at some  18 point it tops out as to what the benefit will be. I  19 don't know the plan.  20 MR. CARTA: That's fair. Again, I think,  21 since we don't know, I think the easiest thing to do  22 is just let the Court address this after we've got a  23 jury verdict and move forward.  24 MR. FASMAN: Not without an instruction  25 that tells the jury that they've got to deduct the</p>	<p style="text-align: right;">Page 1613</p> <p>1 that's what --  2 THE COURT: I know what I say in my  3 charge. Should it be in my charge? You know, I think  4 it has to be, because that would leave us in a  5 position of, you know, we'd be totally in the dark.  6 If it's wrong, you will by then have had an  7 opportunity to solve the issue with respect to the  8 supplemental --  9 MR. DUFFIELD: Incremental difference.  10 THE COURT: Yes, the increases alleged,  11 if there would be an increase, we don't know that.  12 MR. FASMAN: We don't know that.  13 THE COURT: Okay. I'm satisfied with my  14 charge.  15 MR. CARTA: Your Honor, there are a  16 couple other things that we wanted to take up with you  17 as well. Most of them are fairly minor.  18 MS. TRIOLO: Quick and easy. Bottom of  19 page 12, where Your Honor details the damages,  20 includes base salary, raises, profit sharing. Any  21 objection to adding 401(k), which is in Dr. Crakes's?  22 MR. FASMAN: No.  23 MS. TRIOLO: Okay, so maybe right after  24 bonuses.  25 MR. FOX: 401(k) contribution.</p>

<p style="text-align: right;">Page 1614</p> <p>1 MR. CARTA: Contribution, yes.</p> <p>2 THE COURT: Okay.</p> <p>3 MS. TRIOLO: Then on page 13, right above</p> <p>4 where liquidated damages starts, Todd, you and I had</p> <p>5 gone back on the verdict form with regard to the</p> <p>6 burden for mitigation and the two-part analysis that</p> <p>7 cases give, and the way this stated now is</p> <p>8 inconsistent with what we have in the verdict form.</p> <p>9 THE COURT: Inconsistency between the</p> <p>10 charge and the verdict form.</p> <p>11 MS. TRIOLO: I'd like it to say -- the</p> <p>12 cases, Your Honor, are clear that the defendant has a</p> <p>13 two-part burden in proving mitigation. The first is</p> <p>14 to show that suitable work existed, and the second is</p> <p>15 to show that the employee did not make reasonable</p> <p>16 efforts to obtain it. So we've addressed that in the</p> <p>17 verdict form by making it a two-step process.</p> <p>18 You pointed out that case that has an</p> <p>19 exception, so that if, in fact, the defendant has</p> <p>20 proven to the jury that the defendant made no efforts,</p> <p>21 then the defendant does not have to go to the second</p> <p>22 step to show that there were positions out there, but</p> <p>23 it is a two-step process, and I think we should be</p> <p>24 consistent with the verdict form in the charge.</p> <p>25 MR. DUFFIELD: I don't think this is</p>	<p style="text-align: right;">Page 1616</p> <p>1 be the least confusing for them.</p> <p>2 MR. FASMAN: I agree.</p> <p>3 THE COURT: I agree, too.</p> <p>4 MR. DUFFIELD: Because I think the</p> <p>5 questions make them do more analysis.</p> <p>6 MR. CARTA: I think you just resolved</p> <p>7 that issue. Do you have one more?</p> <p>8 MS. TRIOLO: Yes.</p> <p>9 THE LAW CLERK: What just happened?</p> <p>10 MR. DUFFIELD: No change.</p> <p>11 THE LAW CLERK: Okay.</p> <p>12 MS. TRIOLO: So the bottom of page 15.</p> <p>13 So we're saying for willfulness, "It is not enough for</p> <p>14 the plaintiff to show that the defendant knew the ADEA</p> <p>15 existed and might apply to its actions." We agree</p> <p>16 with that. The last sentence on the bottom of page</p> <p>17 15, "It is not enough --" sorry, I have the wrong</p> <p>18 version. It's in liquidated damages, on page 14, and</p> <p>19 so second to last paragraph.</p> <p>20 THE COURT: "It is not enough."</p> <p>21 MS. TRIOLO: There you go. So "It is not</p> <p>22 enough for the plaintiff to show that defendant knew</p> <p>23 that the ADEA existed and might apply to its actions,</p> <p>24 or that it knew it was against the law to discharge an</p> <p>25 employee because of his age." I think that is enough</p>
<p style="text-align: right;">Page 1615</p> <p>1 inconsistent with the verdict form because what he's</p> <p>2 instructing them is that it's our burden to prove that</p> <p>3 he failed to mitigate damages.</p> <p>4 MR. FASMAN: Yes.</p> <p>5 MR. DUFFIELD: When they get the verdict</p> <p>6 form it walks them through that two-step process.</p> <p>7 MS. TRIOLO: They've never been</p> <p>8 instructed that the defendant needs to establish that</p> <p>9 suitable work existed and is part of the defendant's</p> <p>10 burden.</p> <p>11 MR. FASMAN: That's in the verdict form,</p> <p>12 isn't it?</p> <p>13 MR. DUFFIELD: Right.</p> <p>14 MS. TRIOLO: Why wouldn't they be the</p> <p>15 same? Why wouldn't the charge be the same as the</p> <p>16 verdict form? I think we're in agreement that both of</p> <p>17 those elements are part of the defendant's burden.</p> <p>18 MR. DUFFIELD: So you want to explain the</p> <p>19 exception as well?</p> <p>20 MS. TRIOLO: Well, we can revisit.</p> <p>21 MR. DUFFIELD: The way the verdict form</p> <p>22 is written, if they find he didn't exercise, they</p> <p>23 don't get to the suitable issue. So that means --</p> <p>24 which is why I think keeping it simple like this and</p> <p>25 letting them walk through the verdict form is going to</p>	<p style="text-align: right;">Page 1617</p> <p>1 for willfulness, to show that the defendant knew it</p> <p>2 was against the law to discharge an employee because</p> <p>3 of his age.</p> <p>4 MR. FASMAN: No, this is clear, it's got</p> <p>5 to be charged. Every employer -- if you were right</p> <p>6 every employer who said yes, I understand that there</p> <p>7 was an ADEA, and I understand it was unlawful to</p> <p>8 terminate someone because of their age, every employer</p> <p>9 would be engaged in a willful violation. That's never</p> <p>10 been the law. The law is you have to show that the</p> <p>11 defendant knew it was violating ADEA or showed</p> <p>12 reckless disregard.</p> <p>13 MS. TRIOLO: So how is "knew it was</p> <p>14 violating the ADEA" different from --</p> <p>15 MR. FASMAN: It's when an employer says I</p> <p>16 don't care, I don't care, I don't care, I'm firing</p> <p>17 you.</p> <p>18 MS. TRIOLO: That's reckless disregard,</p> <p>19 right?</p> <p>20 MR. FASMAN: I'm firing you and I know</p> <p>21 that I'm the firing you because of your age, and I</p> <p>22 don't care.</p> <p>23 MR. DUFFIELD: The difference, Margaret,</p> <p>24 is this language says that it knew it was against the</p> <p>25 law, and what is required is that they knew it was</p>



<p style="text-align: right;">Page 1618</p> <p>1 against the law and they knew that they were violating 2 the law. 3 MR. FASMAN: Right, it's a two -- 4 MS. TRIOLO: Okay, I'm with you, okay. 5 THE COURT: It's the willful. 6 MR. FASMAN: It doesn't prove willfulness 7 because IBM knows it's against the law to fire 8 somebody because of their age. 9 THE COURT: So we got an agreement on 10 this jury charge subject to the things that -- 11 THE LAW CLERK: Could I ask one question? 12 There was a 401(k) reference on page 13. Can you tell 13 me exactly if -- I'm sorry, 12 -- exactly where it's 14 going to fit? 15 MR. DUFFIELD: After "bonuses," so any 16 pay raises, profit sharing 401(k) contributions. 17 THE LAW CLERK: Gotcha. 18 THE COURT: You got your changes on your 19 thing? 20 THE LAW CLERK: Yes. 21 THE COURT: You can go -- one of you 22 should do it, not two. You should go by what you have 23 on your paper, but you should then go through what I 24 have in my paper. To the extent there's any 25 differences you use my language, because we've kind of</p>	<p style="text-align: right;">Page 1620</p> <p>1 MR. DUFFIELD: He did respond back and 2 say he had one concern with the way the jury charge 3 reads, that questions 2 and 5 could be confusing, if 4 they deduct the pension amount, but then later are 5 being asked what amount have we proven should be 6 deducted for the back pay, they may double deduct. So 7 what I'm going to suggest is for question 5 we add, at 8 the end of it, "as a result of plaintiff's failure to 9 make reasonable efforts to seek employment." 10 THE LAW CLERK: 100 percent what we were 11 just talking about before. 12 MR. DUFFIELD: So now question 5 when 13 they get it will read "What amount, if any, has IBM 14 proven by a preponderance of the evidence should be 15 deducted from the amount of back pay and benefits owed 16 to Mr. Castelluccio as a result of plaintiff's failure 17 to make reasonable efforts to seek employment." So as 18 not to have them double count the deduction of the 19 pension benefits he's receiving. 20 MS. TRIOLO: Okay. 21 THE LAW CLERK: "As a result of 22 plaintiff's failure to --" 23 MR. DUFFIELD: Failure to seek -- just 24 employment or alternative employment? What do you 25 think, Margaret?</p>
<p style="text-align: right;">Page 1619</p> <p>1 hammered while you guys were out of the room, modified 2 sentences and had dangling modifiers, participles. 3 Okay. So take this. 4 THE LAW CLERK: Now we have the verdict 5 form to go through. 6 MR. FASMAN: I think we got this. 7 MS. TRIOLO: We probably are there, only 8 one issue. 9 MR. DUFFIELD: Only one additional issue 10 that you raised, Mike, last night in your e-mail, I 11 think I've got a proposal how to resolve that. 12 THE LAW CLERK: Did the question make 13 sense that I was posing? 14 MR. DUFFIELD: I don't think it's as 15 confusing as you did, but we definitely can be 16 clearer. 17 THE LAW CLERK: We were just talking 18 earlier. 19 MS. TRIOLO: How am I not getting these 20 e-mails? I didn't get that one either. 21 MR. DUFFIELD: You sent us the jury 22 charge last night. 23 MS. TRIOLO: I saw his to you saying does 24 anyone have the jury charge and yours back to him and 25 then I didn't see -- there was one back again?</p>	<p style="text-align: right;">Page 1621</p> <p>1 MS. TRIOLO: I think employment says it, 2 seek reasonable employment. Or should it be 3 reasonable efforts? 4 MR. DUFFIELD: Reasonable efforts. 5 MR. FASMAN: Because if he, in fact, did 6 get a job at 7-Eleven. 7 THE LAW CLERK: "As a result of 8 plaintiff's failure to use reasonable efforts." 9 MR. DUFFIELD: Yes. 10 THE LAW CLERK: "To use reasonable 11 efforts to seek employment." And I think that deals 12 with the concern that I had, that I wasn't clear that 13 number 5 did not relate to number 2. 14 MR. FASMAN: Right. 15 THE LAW CLERK: In any way. 16 MR. FASMAN: I think that's right. 17 THE LAW CLERK: Can I add one more 18 thought? I have not run this by the Judge, I'm just 19 throwing it out there. And then I can leave. 20 On question number 2, which is two parts, 21 just the thought of whether you wanted to essentially 22 make it into 2-A and 2-B, essentially asking the jury 23 to show their work. I don't know if that's helpful or 24 more confusing or any of the above. 25 THE COURT: Remember algebra?</p>

<p style="text-align: right;">Page 1622</p> <p>1 THE LAW CLERK: Yes.</p> <p>2 THE COURT: Remember sitting next to the</p> <p>3 smartest girl in the class? Remember when the</p> <p>4 question was asked --</p> <p>5 THE LAW CLERK: That was me. Not the</p> <p>6 girl.</p> <p>7 THE COURT: The professor always wanted</p> <p>8 to see how you balance the equation. I don't know.</p> <p>9 THE LAW CLERK: The question, it's</p> <p>10 obviously about whether they're going to take off the</p> <p>11 money for the pensions, and if we don't know whether</p> <p>12 they did it or not -- that's one other question, we</p> <p>13 haven't figured out whether or not they should, it</p> <p>14 sounds like, but we might well know if they did it, so</p> <p>15 that if we find out that they shouldn't have, we would</p> <p>16 at least know that it happened. That's just one</p> <p>17 thought on that. We'll be clear what they did, at</p> <p>18 least.</p> <p>19 MR. CARTA: I understand the point. It</p> <p>20 would show better their thinking process. I don't</p> <p>21 know whether that's --</p> <p>22 MS. TRIOLO: So make this, Do you find it</p> <p>23 should be deducted, and then what are you deducting?</p> <p>24 THE LAW CLERK: Show your math, if you're</p> <p>25 deducting 78,000, or whatever, per year, which I think</p>	<p style="text-align: right;">Page 1624</p> <p>1 THE CLERK: Or anybody that would be</p> <p>2 INVOLVED IN a post trial brief.</p> <p>3 THE COURT: Whatever you want to do.</p> <p>4 MR. DUFFIELD: I think what you</p> <p>5 suggested, Mike, makes sense.</p> <p>6 THE COURT: Okay. You got that down?</p> <p>7 THE LAW CLERK: Yeah. And is everybody</p> <p>8 okay with the wording that is used in this, if I just</p> <p>9 break it up? Into essentially two parts?</p> <p>10 MR. FASMAN: I thought you were going to</p> <p>11 put --</p> <p>12 MR. DUFFIELD: I think you leave the</p> <p>13 language the way it is.</p> <p>14 THE LAW CLERK: Because there is specific</p> <p>15 language in the paragraph, use those words, break it</p> <p>16 up into two.</p> <p>17 MR. FASMAN: Yes.</p> <p>18 THE LAW CLERK: 2-A and 2-B, essentially.</p> <p>19 I can move it around the page and see. Why don't I do</p> <p>20 that right now and we'll just --</p> <p>21 THE COURT: Do it right now.</p> <p>22 MR. CARTA: Your Honor, will we have a</p> <p>23 chance to grab a quick lunch before we do closings?</p> <p>24 THE COURT: Definitely. I have never put</p> <p>25 limits on the amount of time for either opening</p>
<p style="text-align: right;">Page 1623</p> <p>1 was something around, I think was 300,000, I think was</p> <p>2 testified, somewhere around 300,000, that it would be</p> <p>3 obvious that they awarded 1 million for salary, and</p> <p>4 took out 300 for the pension benefits already paid by</p> <p>5 IBM. It would be clear that they followed the</p> <p>6 instructions to do so. Whether or not ultimately one</p> <p>7 side is right or wrong on whether or not they should</p> <p>8 have, we would know what they did, and if they</p> <p>9 shouldn't have, we could immediately knock it off and</p> <p>10 say, you know it was a million.</p> <p>11 MR. DUFFIELD: You could just put</p> <p>12 under -- after the language that's in 2, have</p> <p>13 subparagraph A that just says "amount of back pay and</p> <p>14 benefits equals," and then "amount" and a line, and</p> <p>15 then B, "amount of retirement pay and benefits to be</p> <p>16 deducted," and a line, and they're going to fill those</p> <p>17 two numbers in.</p> <p>18 MR. FASMAN: That works.</p> <p>19 THE LAW CLERK: I wrote A minus B equals</p> <p>20 C on my. But I'll defer, obviously, to all the other</p> <p>21 people in the room.</p> <p>22 MR. FASMAN: That's fine.</p> <p>23 MR. DUFFIELD: That's fine.</p> <p>24 MR. CARTA: That's fine.</p> <p>25 MR. FASMAN: It's okay with you, Judge?</p>	<p style="text-align: right;">Page 1625</p> <p>1 statements or closing arguments. I've never done</p> <p>2 that. Don't think I ever will. It's funny that the</p> <p>3 only time when I have seen closing arguments go just</p> <p>4 way over the top is when I'm judging one of these</p> <p>5 things at a law school.</p> <p>6 MR. FASMAN: The worst.</p> <p>7 MR. CARTA: Looks fine to me.</p> <p>8 MR. DUFFIELD: It's fine.</p> <p>9 THE LAW CLERK: Maybe subtracting the</p> <p>10 amount, subtracting the amount listed in 2-B? From</p> <p>11 2-A?</p> <p>12 MR. CARTA: Right.</p> <p>13 THE LAW CLERK: Subtracting the amount</p> <p>14 listed in 2-A.</p> <p>15 MR. CARTA: Identified in.</p> <p>16 THE LAW CLERK: Identified in 2.</p> <p>17 MR. FOX: You have written in 2-A.</p> <p>18 THE LAW CLERK: Subtracting the amount</p> <p>19 you have written in.</p> <p>20 MR. DUFFIELD: 2-B from 2-A.</p> <p>21 THE LAW CLERK: You have written in 2-B</p> <p>22 from 2-A.</p> <p>23 MR. DUFFIELD: Yes.</p> <p>24 THE COURT: Okay. You going to make that</p> <p>25 correction?</p>

<p style="text-align: right;">Page 1626</p> <p>1 THE LAW CLERK: Yes.</p> <p>2 THE COURT: All right. No need for me to</p> <p>3 have this. Make the correction, and this is just --</p> <p>4 MR. DUFFIELD: If the jury has already</p> <p>5 received lunch and is eating, I wonder if we might do</p> <p>6 a shortened lunch period, get back to them more</p> <p>7 quickly.</p> <p>8 MR. CARTA: 45 minutes.</p> <p>9 THE COURT: After?</p> <p>10 MR. FASMAN: Quarter past two, Judge.</p> <p>11 THE COURT: Quarter after 2, that'll be</p> <p>12 good.</p> <p>13 (Recess)</p> <p>14 THE COURT: Okay, we're ready for closing</p> <p>15 arrangements, Mr. Carta?</p> <p>16 MR. CARTA: Yes, we are, Your Honor.</p> <p>17 THE COURT: Good afternoon, ladies and</p> <p>18 gentlemen of the jury. I bet you think we forgot you.</p> <p>19 THE JURORS: Almost.</p> <p>20 THE COURT: We didn't. We were really,</p> <p>21 really working, and I think we made a lot of progress.</p> <p>22 Please sit down. Did you have a good lunch?</p> <p>23 THE JURORS: Excellent, thank you.</p> <p>24 THE COURT: We're now at the stage of the</p> <p>25 trial where the lawyers are going to be making closing</p>	<p style="text-align: right;">Page 1628</p> <p>1 age discrimination, the facts from which you can draw</p> <p>2 an inference. The Judge will tell you later about</p> <p>3 inferences that can be drawn from circumstantial</p> <p>4 evidence, and these are the facts from which you can</p> <p>5 draw an inference of age discrimination, and I'll try</p> <p>6 to pull those together with making as few references</p> <p>7 to WellPoint as I possibly can.</p> <p>8 And finally, I want to respond to what we</p> <p>9 anticipate will be some of IBM's major arguments, so</p> <p>10 that you'll have some sense of what we believe is</p> <p>11 legitimate explanation for some of the points that</p> <p>12 they're going to make.</p> <p>13 As I explained in my opening statement,</p> <p>14 this is not a simple case. You've heard testimony</p> <p>15 from multiple witnesses, you've seen enumerable</p> <p>16 documents, and now you have the task of considering</p> <p>17 all of the evidence and answering one primary</p> <p>18 question, did IBM terminate Mr. Castelluccio because</p> <p>19 of his age. It comes down to that.</p> <p>20 Judge Smith will instruct you that it's</p> <p>21 up to you to determine the credibility of the</p> <p>22 witnesses who testified. It's never easy or pleasant</p> <p>23 to pass judgment on someone's credibility. But at the</p> <p>24 heart of your deliberations is your determination of</p> <p>25 who do you believe.</p>
<p style="text-align: right;">Page 1627</p> <p>1 arguments. As is my policy, I do not require lawyers</p> <p>2 to ask permission to walk around or to walk to the</p> <p>3 jury box, you have standing permission to do that, and</p> <p>4 I really don't have anything more to say except that</p> <p>5 first Plaintiff's counsel gives his closing argument,</p> <p>6 then defense counsel does, and then we go back and</p> <p>7 Plaintiff's counsel has an opportunity for short</p> <p>8 rebuttal closing.</p> <p>9 So without further ado, Mr. Carta, go</p> <p>10 ahead.</p> <p>11 MR. CARTA: First, thanks for your time</p> <p>12 and attention. Mr. Castelluccio and I appreciate the</p> <p>13 personal sacrifice that you've all made to sit through</p> <p>14 a two-week trial. It's admirable. I believe what the</p> <p>15 Judge stated earlier was that you're the most</p> <p>16 attentive jury any of us have ever worked with.</p> <p>17 My closing statement will have three</p> <p>18 parts. The very first part is to address what I think</p> <p>19 is maybe the most critical issue, which is</p> <p>20 credibility. In particular, who do you believe</p> <p>21 between Mr. Castelluccio and Ms. Collins-Smee. And</p> <p>22 I'll spend some time on that because I think that's</p> <p>23 central to the entire case.</p> <p>24 Secondly, I'm going to talk about the</p> <p>25 specific evidence that we think we've established of</p>	<p style="text-align: right;">Page 1629</p> <p>1 When confronted with inconsistent</p> <p>2 accounts of events it's natural to try to reconcile</p> <p>3 and see if there's some way that they both can be</p> <p>4 true. However, here, the stark contrast between the</p> <p>5 testimony of Mr. Castelluccio on the one hand and Ms.</p> <p>6 Collins-Smee on the other compels you to make a</p> <p>7 choice.</p> <p>8 Let's go through some of the</p> <p>9 contradictions that you've heard.</p> <p>10 Mr. Castelluccio testified that in his</p> <p>11 first face-to-face meeting with Ms. Collins-Smee she</p> <p>12 asked him about his age and then asked whether he was</p> <p>13 old enough to retire. When asked about the same</p> <p>14 meeting, Ms. Collins-Smee denied that she had asked</p> <p>15 Mr. Castelluccio about his age and denied that she</p> <p>16 asked him whether he was old enough to retire.</p> <p>17 Black and white.</p> <p>18 There are other stark contrasts in the</p> <p>19 testimony concerning this meeting. Mr. Castelluccio</p> <p>20 testified that Ms. Collins-Smee did not tell him that</p> <p>21 she planned to remove him from his position as VP of</p> <p>22 public sector in February of 2007. He explained that</p> <p>23 he never would and never did involuntarily agree to be</p> <p>24 taken out of his position as VP of public sector, a</p> <p>25 position he had performed successfully for two years.</p>

<p style="text-align: right;">Page 1630</p> <p>1 Why would he?</p> <p>2 And at her deposition, in February of</p> <p>3 2010, in her lawyer's office, while under oath, Ms.</p> <p>4 Collins-Smee represented that she could not recall her</p> <p>5 meeting with Mr. Castelluccio. After the deposition</p> <p>6 she read it and swore again that what she'd said in</p> <p>7 the deposition was the truth.</p> <p>8 Ms. Collins-Smee now tells you, four</p> <p>9 years later, that at their meeting she told Mr.</p> <p>10 Castelluccio that he was not working out as VP of</p> <p>11 public sector, and that he had agreed and said that he</p> <p>12 would be pleased to move out of the PE role, removed</p> <p>13 out of his current role into the role of a PE, a role</p> <p>14 that he had never performed; well, hadn't performed in</p> <p>15 years.</p> <p>16 And how did she justify this newfound</p> <p>17 memory? She did not identify any discussion with</p> <p>18 anyone else or any document which would warrant sudden</p> <p>19 recall of what happened in a meeting in which only she</p> <p>20 and Mr. Castelluccio were present. I believe her</p> <p>21 testimony is, I read every single document that was</p> <p>22 produced, and somehow that made me remember.</p> <p>23 Another contradiction appears between the</p> <p>24 testimony of Mr. Jones and Ms. Collins-Smee. Kelton</p> <p>25 Jones testified that he was positive that he never met</p>	<p style="text-align: right;">Page 1632</p> <p>1 never -- that he would never have assigned Mr.</p> <p>2 Castelluccio as DPE of the WellPoint account.</p> <p>3 Particularly given his relationship, Mr.</p> <p>4 Castelluccio's relationship with Mr. Liederbach.</p> <p>5 Ms. Collins-Smee actually admitted</p> <p>6 indirectly that she agreed with Mr. Jones's</p> <p>7 assessment. Do you recall when Ms. Collins-Smee</p> <p>8 explained why she chose the seven younger</p> <p>9 representatives get those jobs in 2008, in May of</p> <p>10 2008? Unrehearsed, one of her answers was, Well, the</p> <p>11 state of Georgia job, I wouldn't have considered Mr.</p> <p>12 Castelluccio for that, of course I would not have</p> <p>13 considered him for that, because that was one of</p> <p>14 Mr. Liederbach's accounts. Exactly.</p> <p>15 Mr. Castelluccio testified that he had</p> <p>16 the responsibilities of a VP of public sector, and as</p> <p>17 DPE of the WellPoint account, until Mr. Echavarria</p> <p>18 replaced him in June of 2007.</p> <p>19 Ms. Collins-Smee claimed that Mr.</p> <p>20 Castelluccio was assigned full-time on the WellPoint</p> <p>21 account as of April 1, 2007, and that he had no other</p> <p>22 responsibilities.</p> <p>23 Black and white.</p> <p>24 Mr. Castelluccio testified that he</p> <p>25 continued to be responsible for the resource action</p>
<p style="text-align: right;">Page 1631</p> <p>1 with Ms. Collins-Smee to transition his</p> <p>2 responsibilities of head -- as head of IT delivery.</p> <p>3 Mr. Jones also testified that he never discussed Mr.</p> <p>4 Castelluccio with Ms. Collins-Smee after she was</p> <p>5 appointed as head of ITD Americas. To the contrary,</p> <p>6 he specifically recalled that despite his attempts to</p> <p>7 meet with Ms. Collins-Smee, she cancelled their</p> <p>8 meetings.</p> <p>9 In contrast, Ms. Collins-Smee testified</p> <p>10 that after becoming head of ITD Americas she set up a</p> <p>11 transitional meeting with Mr. Jones. She further</p> <p>12 claimed that she and Mr. Jones discussed Mr.</p> <p>13 Castelluccio in this transition meeting, and when</p> <p>14 pressed on this point, she swore she was absolutely</p> <p>15 certain that that's what had happened.</p> <p>16 Again, black and white.</p> <p>17 Yet another contradiction concerns Mr.</p> <p>18 Wisse. Mr. Castelluccio testified that Ms.</p> <p>19 Collins-Smee asked him whether Mr. Wisse was old</p> <p>20 enough to retire, whereas Ms. Collins-Smee swore that</p> <p>21 she never asked Mr. -- about Mr. Wisse, whether he was</p> <p>22 old enough to retire, when she spoke to Mr.</p> <p>23 Castelluccio.</p> <p>24 Again, black or white.</p> <p>25 Kelton Jones testified that he had</p>	<p style="text-align: right;">Page 1633</p> <p>1 until June of 2007. And I want to direct you to a few</p> <p>2 specific exhibits which support Mr. Castelluccio's</p> <p>3 position and contradict the testimony that you heard</p> <p>4 from Ms. Collins-Smee, specifically Plaintiff's</p> <p>5 Exhibit 50, Exhibit 146, also Plaintiff's Exhibit 55,</p> <p>6 Plaintiff's Exhibit 133, and that's specifically at</p> <p>7 page 3, and Defendant's Exhibit 55.</p> <p>8 You will recall that Keenie McDonald</p> <p>9 testified that she was aware Mr. Castelluccio was busy</p> <p>10 because he was involved in the resource action. She</p> <p>11 sat there and specifically mentioned he was too busy,</p> <p>12 was busy because he was also involved in the resource</p> <p>13 action. And of course Mr. Liederbach authored an</p> <p>14 e-mail stating that between WellPoint and Mr.</p> <p>15 Castelluccio's involvement in the resource action, Jim</p> <p>16 would be likely to, quote, implode. Recall Exhibit</p> <p>17 53.</p> <p>18 One of the more remarkable things in this</p> <p>19 trial is IBM has never even attempted, attempted to</p> <p>20 explain away Mr. Liederbach's statement. Why in the</p> <p>21 world would Mr. Liederbach be concerned about Mr.</p> <p>22 Castelluccio's involvement in the resource action if</p> <p>23 it's true, as Ms. Collins-Smee said, he had no</p> <p>24 involvement in that? Or minimal involvement?</p> <p>25 In contrast, Ms. Collins-Smee claimed</p>

<p style="text-align: right;">Page 1634</p> <p>1 that she relieved Mr. Castelluccio of all his 2 responsibilities for the resource action as of April 3 1, 2007.</p> <p>4 Mr. Castelluccio testified that that LEAN 5 initiative that you heard about was among the vice 6 president of public sector responsibilities and that 7 he had to continue to discharge those responsibilities 8 even after he was assigned as DPE to WellPoint, 9 whereas Ms. Collins-Smee claimed Mr. Castelluccio had 10 no responsibilities for the LEAN initiative 11 whatsoever.</p> <p>12 Kelton Jones testified that it was an IBM 13 manager's responsibility to make sure that his or her 14 executives were kept busy, productive and working. He 15 explained that if a manager removed an executive from 16 a position, it was the manager's responsibility both 17 to the executive and to IBM to be sure he was 18 advocating on behalf of that manager and working to 19 get him a new position.</p> <p>20 On the other hand, Ms. Collins-Smee 21 claimed she had no responsibility to locate a new 22 position for an executive whom she pulled off another 23 position. She argued that the efforts that she made 24 were purely voluntary. Dramatic contrast between Mr. 25 Jones, who had absolutely no motive to say anything</p>	<p style="text-align: right;">Page 1636</p> <p>1 executives are not assigned temporary work while they 2 were on the bench.</p> <p>3 Black and white.</p> <p>4 Ms. Collins-Smee testified that she made 5 a consistent good faith effort to find Mr. 6 Castelluccio a new position. However, her own 7 documents make it clear that her efforts were almost 8 exclusively made in the same month that she fired Mr. 9 Castelluccio, and her efforts were limited to two 10 half-hearted e-mails, and in her own words were 11 motivated by her desire to, quote, make a record.</p> <p>12 Ask yourself, why did Ms. Collins-Smee 13 feel in May of 2008 she needed to make a record? What 14 was it she was hiding?</p> <p>15 Finally, IBM's PBC manual, which is 16 Exhibit 1, clearly identifies and defines a number 2 17 rating. It's defined as, quote, a solid contributor, 18 quote, consistently meets job responsibilities, is 19 reliable in doing job, demonstrates appropriate level 20 of knowledge, skill, effectiveness and initiative.</p> <p>21 Ms. Collins-Smee argued to you that a 2 22 rating was a poor rating for an executive. Not only 23 has she provided you with nothing to support her 24 claim, but her own conduct, her own conduct 25 contradicts this assertion.</p>
<p style="text-align: right;">Page 1635</p> <p>1 but the absolute truth, and Ms. Collins-Smee.</p> <p>2 Mr. Castelluccio testified that it was 3 standard practice to assign temporary work to an 4 executive who was not otherwise fully occupied, and 5 not assigned to a full-time position. He explained 6 that it made good sense for IBM to keep an executive 7 productive, and it made good sense for the executive 8 to keep his skills sharp and to stay involved.</p> <p>9 Kelton Jones agreed. Kelton Jones 10 explained that it was appropriate to assign an 11 executive temporary work if there was a lapse between 12 two full-time assignments.</p> <p>13 An excellent example of the appropriate 14 procedure that should have been followed is Mike 15 Morin, and I think I mentioned this in my opening. 16 Remember what happened to Mr. Morin? He quit, and 17 they gave him two temporary jobs to keep him busy and 18 then finally put him on his permanent DEP on The 19 Hartford account. Temporary work was a regular part 20 of operations at IBM</p> <p>21 You also heard Keith Holmes, 22 Collins-Smee's own human resource expert, and he 23 admitted on the stand yesterday that it was typical 24 for an executive on the bench to have temporary work 25 assigned to them. Ms. Collins-Smee claimed that IBM</p>	<p style="text-align: right;">Page 1637</p> <p>1 You may recall that she testified that 2 she wanted to fill seven executive positions she had 3 available in May of 2008, and she stated she wanted to 4 fill them with the most qualified candidates.</p> <p>5 Nevertheless, she had already assessed three of those 6 executives as 2 performers. In fact, made those 7 assessments on the very same day that she had assessed 8 Mr. Castelluccio as a 2 performer.</p> <p>9 So what is it? Were they the most 10 qualified candidates, or were they poor performing 11 executives? You can't have it both ways.</p> <p>12 As I mentioned in my opening, Ms. 13 Collins-Smee would try her best to distance herself 14 from the hard truth that she and Mr. Zapfel, she and 15 Mr. Zapfel, had rated Mr. Castelluccio with a 2 on the 16 PBC evaluation form in 2007.</p> <p>17 Let me move on to a discussion about some 18 of the indicia of age discrimination. You may recall 19 that Mr. Fasman repeatedly emphasized that there was 20 no expressed statement of age bias. No one at IBM had 21 said Mr. Castelluccio was long in the tooth, no one 22 said he was an old man, or came out and told him that 23 he was too old to work. Do you remember that was sort 24 of a pattern after many of the witnesses?</p> <p>25 His two points seemed to be, first, that</p>



<p style="text-align: right;">Page 1638</p> <p>1 others at IBM did not have an age bias, and second,  2 that there was no smoking gun in this case.  3 This type of argument is called a straw  4 man. The idea is that someone makes an exaggerated  5 argument about the other parties' position, and then  6 knocks it down like a straw man as if they've  7 accomplished something.  8 Mr. Castelluccio is not and has never  9 claimed that everyone at IBM is biased against 60  10 year-old employees. Mr. Castelluccio's claim is  11 simply that Ms. Collins-Smee demonstrated a  12 discernible pattern of age discrimination against him.  13 You may also remember that in my opening  14 I alerted you to the fact that you were not likely to  15 see any smoking guns. The reality is that in age  16 discrimination cases, especially ones that go to  17 trial, there's rarely a smoking gun.  18 Judge Smith will likely instruct you, age  19 discrimination cases are often proven by  20 circumstantial evidence since an employer who  21 discriminates is likely -- is unlikely to leave an  22 open trail.  23 I also suggested to you in my opening  24 that often age discrimination cases is only revealed  25 when an employer's conduct is scrutinized over a</p>	<p style="text-align: right;">Page 1640</p> <p>1 had a younger replacement lined up, four months later.  2 One of the exhibits that you'll find in  3 your notebooks, and it's in the front of the notebook,  4 is an exhibit called Critical Time Lapses. Just take  5 a look at this when you get to deliberate, and it will  6 show you the number of times Ms. Collins-Smee made  7 decisions that were critical, critical to Mr.  8 Castelluccio's career and livelihood and delayed  9 telling him.  10 We wanted it to be in the front of the  11 notebook so it's easy and you don't have to go hunting  12 for them. I say "we," my good hard-working crew.  13 More importantly even than her decision  14 to remove Mr. Castelluccio from his position is the  15 fact that there was no evidence that she had taken any  16 steps to arrange for a position for him to continue  17 his career. She ultimately stuck him in the role as  18 VP of public sector, but think about it, what steps  19 had she taken before that to arrange a position for  20 him? None.  21 Ms. Collins-Smee's conduct contrasts  22 sharply with Kelton Jones' plan. As Mr. Jones came  23 and explained to you, he had planned to simultaneously  24 move Mr. Castelluccio into a new position while  25 putting a new executive into the VP position, a plan</p>
<p style="text-align: right;">Page 1639</p> <p>1 period of time.  2 Ms. Collins-Smee's age bias against Mr.  3 Castelluccio can be inferred from the ways in which  4 she treated him differently than she treated younger  5 employees. Let's review some of the evidence from  6 which you can infer Ms. Collins-Smee's age bias  7 against Mr. Castelluccio.  8 Ms. Collins-Smee's age bias can be  9 inferred from her decision to remove Mr. Castelluccio,  10 the oldest vice president reporting to her, from his  11 position as VP of public sector. You recall that she  12 stressed the fact that this was an independent  13 decision that she made only a month after observing  14 Mr. Castelluccio, a decision which ignored that he had  15 successfully performed in this job for two full years,  16 a decision which, at best, was based on complaints  17 about only one of his 30 accounts, and that was the  18 account which had been in a crisis mode since it first  19 started.  20 In deciding whether the decision to  21 remove Mr. Castelluccio as vice president, in deciding  22 whether that suggests age bias against Mr.  23 Castelluccio, please keep in mind that her e-mail  24 makes it clear that she decided to replace him in  25 February of 2006, but she did not tell him until she</p>	<p style="text-align: right;">Page 1641</p> <p>1 that Mr. Jones was confident that he could execute at  2 the most within two or three months.  3 Although IBM attempted to insinuate that  4 Mr. Jones' plan was based on outdated information, you  5 can recall that Mr. Jones determined that he could  6 easily find a new position for Mr. Castelluccio within  7 two or three months, and he based that assessment on  8 an availability of positions within the organization  9 that he ran in the first quarter of 2007. He wasn't  10 running it in the first quarter of 2007, but he was  11 there, and that's when he made the assessment.  12 Later in the same year Mr. Castelluccio  13 was removed from his position as VP of public sector,  14 that was in June of 2007, and then later informed that  15 he was going to be removed from the DPE position, and  16 that was in November of 2007. So Mr. Jones' awareness  17 of what the availability was I do think is timely.  18 That's for you to decide.  19 Ms. Collins-Smee's age bias against Mr.  20 Castelluccio can also be inferred from her failure to  21 place Mr. Castelluccio on Pat Kerin's 5-minute drill.  22 A failure to do what she herself said she needed to  23 do.  24 You'll remember the exhibit in which she  25 sent an e-mail to Mr. Holmes and she said, We need to</p>

<p style="text-align: right;">Page 1642</p> <p>1 get Jim on Pat Kerin's 5-minute drill. She now said  2 she didn't have any responsibility, but the  3 contemporaneous document speaks volumes. We need to  4 get Jim Castelluccio on Pat Kerin's drill.  5 What happened? He didn't appear on Pat  6 Kerin's drill for months and months and months. And  7 that failure left Mr. Castelluccio without any job  8 prospects when she later removed him from the position  9 of DPE of WellPoint.  10 Ms. Collins-Smee's age bias against Mr.  11 Castelluccio can also be inferred from the three  12 references to Mr. Castelluccio's retirement she made  13 despite his clear communication that he was not  14 interested in retiring. To her credit she didn't deny  15 that he had made it clear to her in their first  16 conversation on the subject that he had no interest in  17 retirement.  18 Consider what you would think if you were  19 60 and you told your boss that you had no interest in  20 retiring and wanted to continue to work but  21 nevertheless your boss raised the subject on two  22 occasions about whether or not you wanted to retire.  23 Ms. Collins-Smee's age bias against Mr.  24 Castelluccio can also be inferred from her decision to  25 assign Mr. Castelluccio as DPE on the WellPoint</p>	<p style="text-align: right;">Page 1644</p> <p>1 apparent from the fact that she not only assigned him  2 to Mr. Morin's responsibilities, but also kept him in  3 the position as VP of public sector for four months,  4 where he continued to be responsible for both the LEAN  5 initiative and the time-consuming resource action.  6 The impossible situation in which Ms.  7 Collins-Smee placed Mr. Castelluccio was made worse by  8 the untrue statement to Mr. Castelluccio that he was  9 permanently on the WellPoint account as DPE. She told  10 him that, while at the same time her colleagues -- she  11 told her colleagues and the client himself, both Dave  12 McDonald and Mark Boxer, that he was temporary, and  13 continued to interview younger individuals for the  14 same position.  15 Ms. Collins-Smee's age bias against Mr.  16 Castelluccio can also be inferred from her decision to  17 remove Mr. Castelluccio from his position as DPE on  18 the WellPoint account. The evidence showed that  19 WellPoint accepted Mr. Crawford in mid-September of  20 2007, but she did not disclose to Mr. Castelluccio  21 that he had -- that he was being replaced at WellPoint  22 until the day before Thanksgiving in November.  23 Further, when she removed him, she had  24 taken no steps to relocate another -- to locate  25 another position for him. Again, pulled him out of a</p>
<p style="text-align: right;">Page 1643</p> <p>1 account. It is beyond dispute that the WellPoint  2 account was a disaster at the time.  3 It is also undisputed that Mike Morin, an  4 extraordinary performer by everyone's assessment, was  5 forced to tender his resignation after months, months  6 of working seven days a week, sometimes 24 hours a  7 day.  8 You will also recall that even Gordon  9 Crawford, a winner of IBM's acclaimed Chairman's  10 Award, explained that he worked from January of 2008  11 to Easter of 2009 without getting three consecutive  12 nights of sleep when he was WellPoint's DPE. And Mr.  13 Morin, unlike Mr. Castelluccio, had no other  14 responsibilities, nor did Mr. Crawford have any other  15 responsibilities when he was in that position.  16 Again, in the front of your notebook you  17 will see a document that says Plaintiff's 119, but  18 it's entitled Mr. Castelluccio's Responsibilities in  19 the Second Half of 2007, and it tries to show you in a  20 graphic format -- probably not nearly as sexy as the  21 exhibits you'll see later -- but it tries to show you  22 in a graphic format all of the responsibilities that  23 Mr. Castelluccio had in the second quarter of 2007.  24 Ms. Collins-Smee's ulterior motive to  25 force Mr. Castelluccio to retire is most clearly</p>	<p style="text-align: right;">Page 1645</p> <p>1 position with no thought about what was going to  2 happen with his future.  3 She does not even add him to her 5-minute  4 drill until January, and then only in the capacity as  5 a person to move. As Keith Holmes was honest enough  6 to admit, she never once added him to her slate of  7 candidates, and, quote, rarely discussed him on her  8 5-minute drills.  9 Mr. Fasman identified a total of 15  10 drills in which there's reference to Mr. Castelluccio.  11 Please take a look at the three 5-minute drill  12 summaries that we have prepared. They're going to be  13 in front of your notebook. You've seen one page up on  14 the screen from these, but they're multi-page  15 documents, and they go through -- in one column you'll  16 see the date of the drill, the actual document of the  17 drill, and the next column it shows you the key open  18 positions, and then it'll show you whether Mr.  19 Castelluccio was identified as someone on the slate of  20 candidates, and then on the far right column it  21 indicates yes or no, whether or not he was listed for  22 that one month as a key person to discuss.  23 So here, for example, you can see that  24 there are three drills, and two of the drills he was  25 not listed as a person to discuss, and in the third</p>

<p style="text-align: right;">Page 1646</p> <p>1 drill he was. Again, these will be in the front of 2 your notebooks. 3 As IBM will undoubtedly point out, Mr. 4 Castelluccio appeared most frequently on Mr. Zapfel's 5 drill. But let's take a close look at that. 6 Starting with the March 2007 drill in 7 which his position as VP of public sector was listed, 8 going all the way through June of 2008, which was the 9 last month Mr. Castelluccio worked at IBM, there were 10 15 monthly drills on which Mr. Castelluccio should 11 have appeared at least as a key person to discuss. 15 12 opportunities to list him. He appeared on as many as 13 11 of those drills, and in a limited capacity as 14 someone to -- as a person who's available. 15 And I'm giving IBM the benefit of the 16 doubt here. Many of the drills -- two of the drills, 17 actually, the September and October drill, have 18 multiple versions, and I think those are among the 19 exhibits, in which in one of the drills, he does 20 appear in the September drill, and there was another 21 September drill where he doesn't appear, and then the 22 October drill there's one version where he does appear 23 and one where he does not appear. So I've given them 24 credit when I say that on those 15 drills he appeared 25 on 11. It's possible it was only nine.</p>	<p style="text-align: right;">Page 1648</p> <p>1 each of the three relevant drills, Mr. Zapfel's, Pat 2 Kerin's, a separate document, and then Ms. 3 Collins-Smee's. So let's talk about Ms. 4 Collins-Smee's own 5-minute drills. 5 IBM produced documents showing Ms. 6 Collins-Smee conducted ten 5-minute drills between 7 June 2007 and May of 2008. In these drills Ms. 8 Collins-Smee only identified Mr. Castelluccio once as 9 a key person to discuss. In this time period Ms. 10 Collins-Smee listed 56 open positions that Mr. 11 Castelluccio was not added to a single one of the 56 12 slates on Ms. Collins-Smee's own 5-minute drills. 13 This is important, as we tried to stress 14 earlier, because, as Mr. Castelluccio said, as Mr. 15 Jones said, and even as Mr. Holmes agreed, the key 16 positions for Mr. Castelluccio given his skills and 17 expertise were being filled on Ms. Collins-Smee's 18 drill. 19 So let's talk about Pat Kerin's drill. 20 With respect to Mr. Kerin's drill, between March 2007 21 and June of 2008 there were 15 different drills. Mr. 22 Castelluccio appeared as a key person to discuss on 23 only one of those drills. This one time was in 24 October of 2007, seven months after Ms. Collins-Smee 25 decided to move Mr. Castelluccio as VP of public</p>
<p style="text-align: right;">Page 1647</p> <p>1 However, if you look beyond the simple 2 listing of his name as a person who was available and 3 you look to the slate of candidates, that's the key 4 point, that's where you get your job. You have to be 5 identified and connected with a specific opening, and 6 having someone advocate for you for that opening. 7 If you look at that, a completely 8 different picture emerges. Even on Mr. Zapfel's 9 drill. In the same time period, this is the time 10 period beginning in March all the way through June of 11 2008, there were 102 openings, open positions, and 102 12 slates of candidates set forth on Mr. Zapfel's drill. 13 Mr. Castelluccio was added to one of those 102 slates. 14 And if you may recall Mr. Castelluccio's 15 testimony, I walked him through this, even that one 16 opportunity, when you look at the notes, that position 17 had already been taken by the time he was added to the 18 slate. 19 Mr. Castelluccio is not claiming that he 20 should have been hired for each of the positions on 21 Mr. Zapfel's drill. That's not the point. But an 22 inference of discrimination can be drawn from the fact 23 that he was not even considered for these positions. 24 A review of Ms. Collins-Smee's own drill 25 is even more telling. Again, we have one summary for</p>	<p style="text-align: right;">Page 1649</p> <p>1 sector, and seven months after she told Mr. Holmes, 2 let's put Jim on Pat Kerin's drill. During this time 3 period, just on Mr. Kerin's drill, there were 204 open 4 positions that were listed. Mr. Castelluccio was not 5 included in one of those 204 slates. 6 So for those of us who like numbers, 7 here's a wrap-up. In summary, between the three 8 different drills run by the three relevant executives 9 there were a total of 40 monthly drills and over 360 10 open positions. Of the 40 different drills Mr. 11 Castelluccio appeared as a person to move on a total 12 of 13 of those 40 drills. Similarly, with respect to 13 the three different drills, Mr. Castelluccio was added 14 to only one, only one of the 360 slates of candidates. 15 Hard to believe that he had an advocate speaking on 16 his behalf. The documents sure don't support that. 17 The most compelling evidence of Ms. 18 Collins-Smee's age bias is her treatment of Mr. 19 Castelluccio after she stuck him on the bench and set 20 him up to be fired. Why? Because he had no job. So 21 let's just focus on that time period, just the time 22 period before his termination when he was put on the 23 bench. 24 Ms. Collins-Smee's assignment of Mr. 25 Castelluccio to the bench in and of itself is evidence</p>

<p style="text-align: right;">Page 1650</p> <p>1 of age bias when there was an abundance of work. Ms.  2 Collins-Smee's failure to provide Mr. Castelluccio  3 with temporary work while he was on the bench, despite  4 the testimony that you heard that that was standard  5 protocol.  6 Ms. Collins-Smee's age bias can also be  7 inferred from her failure to inform Mr. Castelluccio  8 of at least 106 positions that were available during  9 that one window between January and May of 2008 on the  10 three different drills. And I believe we've already  11 given you a document to that effect.  12 Ms. Collins-Smee's failure to inform Mr.  13 Castelluccio of the seven job openings that she filled  14 within her own organization by younger executives in  15 May of 2008, the same month she told him there's no  16 work for you, you're going to be fired within the  17 next -- fired as of 30 days.  18 Other indicia of discrimination that  19 occurred during that window of time is Ms.  20 Collins-Smee's failure to inform him of a job opening  21 at Quest. You heard Mr. Castelluccio describe how  22 that was an ideal position for him.  23 And that statement was also supported by  24 the testimony of Kelton Jones who testified that Mr.  25 Castelluccio had the wherewithal, the skills and the</p>	<p style="text-align: right;">Page 1652</p> <p>1 outside the 5-minute drill.  2 And finally, you can draw an inference of  3 discrimination from IBM's shifting explanations as to  4 why it terminated Mr. Castelluccio. At one point it's  5 poor performance, then they have a 2 rating to deal  6 with, so maybe it's just a failure to find a job, and  7 they shift back and forth.  8 Let me go to the final third of my  9 discussion with you and address some of the  10 contentions that we anticipate IBM is going to be  11 making.  12 In the face of this weighty evidence IBM  13 argues that Mr. Castelluccio was not terminated  14 because of his age. IBM claims now that Mr.  15 Castelluccio was terminated because he could simply  16 not find a job. Not our problem, he couldn't find a  17 job. Are you convinced that that's the real reason?  18 In view of the evidence, does that really make sense?  19 You just heard me go through the number of openings.  20 Mr. Castelluccio was a 40-year veteran  21 who had multiple positions within IBM. Mr. Messina  22 wrote in Mr. Castelluccio's PBC that Jim has done an  23 extraordinary job managing the Lucent contract. IBM's  24 single largest account at the time. It was a monster.  25 It was a huge professional coupe. Mr. Messina</p>
<p style="text-align: right;">Page 1651</p> <p>1 experience to be a VP in any situation within the IT  2 delivery organization.  3 Ms. Collins-Smee's age bias again can  4 be -- was evidenced by her exclusion of Mr.  5 Castelluccio from professional development  6 opportunities. You may remember Mr. Castelluccio  7 talking about how he wanted to go to a seminar in  8 Lexington, Kentucky. Not only did she send an e-mail  9 to everybody else but him, but when he asked for the  10 materials, she denied him the chance to even review  11 the material so he could stay current.  12 And also little things, like the fact  13 that he twice requested a BlackBerry because Mark  14 Boxer was a Blackberry type person, and if you had  15 somebody like that you know there's a mode you have to  16 communicate with that person, and you've heard a lot  17 of stories about how important it was to be in touch  18 with Mr. Boxer. A simple thing like a BlackBerry, he  19 asked for it twice, and she refused to give him  20 approval for it.  21 Age bias can also be inferred from her  22 failure to advocate for Mr. Castelluccio outside the  23 5-minute drill. You heard testimony from a number of  24 witnesses about how important it was for a manager to  25 advocate not just within a 5-minute drill, but also</p>	<p style="text-align: right;">Page 1653</p> <p>1 described Jim as, quote, one of the best DPEs in the  2 business.  3 Mr. Jones described Mr. Castelluccio's  4 strong leadership abilities in his PBC, and in his  5 testimony here, he explained that Mr. Castelluccio had  6 a very high skill level and was capable of performing  7 any DPE level position in the IT delivery business.  8 Mr. Morin. Mr. Morin also described Mr.  9 Castelluccio as a strong leader, a person who knew how  10 to get things done, a strategist, and a person of real  11 personal integrity.  12 Even Gordon Crawford commended or  13 commented positively on Mr. Castelluccio's  14 professionalism and his technical background.  15 The 5-minute drills that were conducted  16 during the time that Mr. Castelluccio was on the bench  17 showed that at least 106 Band C and Band D positions  18 were available during the six month period that he was  19 on the bench. 106. He was looking for one.  20 Kelton Jones testified that immediately  21 before he left he had reviewed possible positions for  22 Mr. Castelluccio and planned to move him into a new  23 position in parallel with him leaving the DPE  24 position. He was going to backfill that position and  25 move Mr. Castelluccio into another position.</p>



<p style="text-align: right;">Page 1654</p> <p>1 Mr. Jones was confident that even if the 2 rotation didn't move as he planned simultaneously, 3 that within two to three months at the most he would 4 have an appropriate VP position for Mr. Castelluccio. 5 He testified about how he would use his 5-minute drill 6 to accomplish that. Something Ms. Collins-Smee 7 absolutely did not do. Again, he was rarely discussed 8 in her 5-minute drills. 9 Ms. Collins-Smee placed seven younger 10 executives into positions for which Mr. Castelluccio 11 had the necessary skills and expertise. You also 12 heard testimony about how much work there was at IBM 13 during this time period. Ms. Collins-Smee was sending 14 e-mails at 3 in the morning. Mr. Morin went days 15 without showering or eating. 16 Mr. Jones testified that in all the years 17 he had worked at IBM's IT delivery business, he had 18 never operated with a bench. He said to me, What 19 bench? We didn't have a bench. What we had was too 20 much work. I couldn't have people on the bench. I 21 needed them to work. All our people were overworked. 22 It is hard to believe that there was no 23 position at IBM for Mr. Castelluccio. A preponderance 24 of the evidence indicates that there was plenty of 25 work. The problem wasn't work. The problem was with</p>	<p style="text-align: right;">Page 1656</p> <p>1 And what about the WellPoint contract? 2 You heard multiple witnesses testify, using almost 3 identical words, hmm, that Mr. Castelluccio was 4 assigned to WellPoint with the hope and intention that 5 he would be permanent. They said essentially it was 6 one account as opposed to 30, had less 7 responsibilities for making easier for him. But let's 8 not forget that this was the WellPoint account. Mr. 9 Morin resigned under the pressure of the work there, 10 and according to Keenie McDonald he hadn't been 11 successful. 12 Another interesting contradiction with 13 respect to Ms. Collins-Smee, you remember she said he 14 had been successful. Keenie McDonald, the person on 15 the account, said he wasn't. Hmm. 16 All the witnesses confirmed Mr. Morin's 17 testimony that the account was among the worst, if not 18 the worst they'd ever seen. Does it make sense that 19 this is where Mr. Castelluccio was put so that he 20 could improve? If Ms. Collins-Smee thought that Mr. 21 Castelluccio's performance was declining, would she 22 ever have assigned him to what Mr. Liederbach called, 23 quote, the most important role on the WellPoint 24 account, an account which he described as his largest 25 and most important account?</p>
<p style="text-align: right;">Page 1655</p> <p>1 Ms. Collins-Smee's failure to discharge her duties to 2 assist Mr. Castelluccio in getting placed in a new 3 position. And why? Because she believed he was too 4 old to work. 5 IBM claims that Mr. Castelluccio was a 6 poor performer in two different roles. You heard 7 extensive testimony about -- from IBM about Mr. 8 Castelluccio's performance. Although IBM is no longer 9 claiming that Mr. Castelluccio was terminated because 10 of his performance, you recall that that's what they 11 said in the past. 12 IBM never contested that as VP of public 13 sector Mr. Castelluccio was responsible for 30 14 different contracts. Think about this. I don't 15 recall any testimony or documents that indicated 16 performance concerns on any of the other contracts. I 17 might have missed something, but I was listening for 18 that. I don't recall any other complaints. 19 To the contrary, Mr. Jones testified that 20 Mr. Castelluccio had the highest customer satisfaction 21 ratings of all of his VPs. If I recall correctly, 22 even Mr. Liederbach, who was responsible, you may 23 remember, he was responsible for the same group of 24 contracts, even Mr. Liederbach did not testify about 25 problems with Mr. Castelluccio's other contracts.</p>	<p style="text-align: right;">Page 1657</p> <p>1 I anticipate that IBM will argue that it 2 would make no sense for them to assign Mr. 3 Castelluccio to the WellPoint account with the 4 expectation that he would fail. Why assign someone to 5 an account where they're going to fail? The client is 6 too important. IBM will say, why run the risk of 7 further straining the already stressed relationship 8 with WellPoint. 9 There's a good answer to this question. 10 All the evidence supports that answer. The answer is, 11 Ms. Collins-Smee threw Mr. Castelluccio into the 12 breach when Mike Morin quit fully expecting Mr. 13 Castelluccio to choose to retire. She believed that 14 Mr. Castelluccio would follow Mr. Morin's lead and 15 quit rather than deal with the embarrassment of what 16 was essentially a demotion and the prospect of 17 shouldering the work on WellPoint account. I would 18 have quit. A workload you heard both Mr. Morin and 19 Mr. Crawford describe to you. 20 And what is the best evidence of this 21 fact? Look at the parade of candidates Ms. 22 Collins-Smee marched past Mr. Boxer. It's 23 particularly important to recall Mr. Liederbach's 24 testimony, his admission that Ms. Collins-Smee never 25 stopped looking for someone else to fill Mike Morin's</p>



<p style="text-align: right;">Page 1658</p> <p>1 shoes. Is that the conduct of someone who's planning 2 to put you in a role permanently, who kept coming back 3 more and more with younger candidates? 4 Two things went wrong with Ms. 5 Collins-Smee's plan to force Mr. Castelluccio to 6 retire. First, Mr. Castelluccio to his credit kept 7 trying to manage through the crisis at WellPoint 8 rather than resigning. You've heard the phrase "an 9 IBMer." If there was ever an IBMer, that's Mr. 10 Castelluccio. He decided he's going to tough it out. 11 Second, Mr. Boxer kept rejecting the 12 younger inexperienced candidates presented to him. 13 Ms. Collins-Smee hadn't anticipated that. As a 14 result, Ms. Collins-Smee left Mr. Castelluccio in the 15 hot seat until Mr. Zapfel located Mr. Crawford. 16 When IBM argues that its assignment of 17 Mr. Crawford as WellPoint's DPE is proof that Ms. 18 Collins-Smee did not have an age bias, please keep two 19 things in mind. First, it was Mr. Zapfel who was 20 instrumental in bringing in Mr. Crawford. You will 21 recall that Mr. Zapfel -- I'm sorry -- that Mr. 22 Crawford described Mr. Zapfel as, quote, his mentor. 23 I got in touch with my mentor, Mr. Zapfel. You will 24 also recall that Keenie McDonald admitted that Mark 25 Boxer would only accept a candidate that had</p>	<p style="text-align: right;">Page 1660</p> <p>1 months to turn around IBM? You remember the parade of 2 candidates kept coming in, the whole time. 3 Does it make sense that Ms. Collins-Smee 4 put Mr. Castelluccio on an account that Dave 5 Liederbach oversaw? You heard Mr. Jones' testimony 6 and opinion about that. He knew that there had been a 7 conflict between the two. In fact, she testified that 8 she didn't even consider putting Mr. Castelluccio on 9 the state of Georgia account for that same reason, the 10 point I've alluded to earlier. Yet she did assign him 11 to the WellPoint account, which was Mr. Liederbach's 12 most important and largest account. That's what she 13 says. 14 You also heard repeated testimony about 15 the standard procedure at IBM for presenting a DPE 16 candidate to a client. A procedure Ms. Collins-Smee 17 failed to follow in Mr. Castelluccio's case. 18 Lastly, if Mr. Castelluccio was really 19 put on the account to prove himself, why did IBM 20 continuously send other executives to interview with 21 Mr. Boxer. If they had thought things would work out, 22 well, now that Mr. Castelluccio was on the account, 23 why would they keep going back to Mr. Boxer time and 24 again and just frustrate him by sending him candidates 25 to interview? Makes no sense.</p>
<p style="text-align: right;">Page 1659</p> <p>1 Mr. Zapfel's personal stamp of approval. 2 The other thing to keep in mind is that 3 all of this only occurred after at least five of Ms. 4 Collins-Smee's younger candidates had been rejected by 5 WellPoint. 6 Please ask yourself how Mr. Castelluccio 7 could have been expected to succeed while he was also 8 required to continue his responsibilities for four 9 months as VP of public sector. Mr. Morin couldn't 10 succeed working 24 hours a day on the WellPoint 11 account. How is it possible to have expected Mr. 12 Castelluccio to stay in that position and succeed? 13 Again, I draw your attention to the 14 document that shows the overlapping responsibilities 15 at the same time. 16 Also please keep in mind the benefits of 17 all the work that had been performed before Mr. 18 Crawford came into the picture. Even with respect to 19 all that work that had been performed by the first 20 DPE, then by Mr. Morin, and then by Mr. Castelluccio. 21 It still took Mr. Crawford, an obviously 22 extraordinarily able man, it still took him at least 23 six to eight months to begin to achieve measurable 24 improvements. Six to eight months. Is there any time 25 period where Mr. Castelluccio was given six to eight</p>	<p style="text-align: right;">Page 1661</p> <p>1 Mr. Castelluccio testified that he 2 enjoyed working at IBM, and that he intended to remain 3 there through the age of 65 until his 66th birthday in 4 March of 2013. He made every effort he could to 5 locate a position while he was on the bench. He 6 reached out to contacts. He sent his resumé, and he 7 repeatedly asked Ms. Collins-Smee to follow through on 8 her commitment to assist him. He was willing to 9 accept the position at a lower executive level, and 10 even to relocate to wherever it took. Even Manila, 11 with spiders. 12 But, as Kelton Jones testified, and as 13 Keith Holmes affirmed, without the support of his 14 manager, Ms. Collins-Smee, whose responsibility it 15 truly was to help him, he had little chance of 16 success. 17 Let's just talk for a moment about this 18 Band 10 position issue. IBM has suggested that Mr. 19 Castelluccio should have applied for a position below 20 an executive level, a Band 10 job. You may remember 21 that there's Band 1 to 10, then there's the executive 22 levels, which go from D all the way up to A, and Mr. 23 Castelluccio had worked his way up over 40 years to 24 the D Band, and up to the C Band. 25 Kelton Jones responded to the suggestion</p>

<p style="text-align: right;">Page 1662</p> <p>1 of Mr. Castelluccio taking that sort of a jump,  2 suggesting that in his experience at IBM there would  3 never have been a C executive looking at a Band 10  4 job.  5 Mr. Castelluccio also testified that if  6 he as a manager had seen someone at a VP level come to  7 him and say he was willing to take a Band 10 position  8 over which Mr. Castelluccio had authority, he would  9 have serious, serious doubt about the executive's  10 credentials and about his ability to perform. It's  11 just something that wasn't done. Even Mr. Holmes  12 admitted that such a step would be extraordinary.  13 Let me just talk for a moment more about  14 Mr. Castelluccio's post-employment attempts to find a  15 job. Mr. Castelluccio told you about his efforts to  16 find a job after being terminated by IBM. He devoted  17 five days a week, all day to this search. He  18 consulted experts, had people work with his resumé,  19 refined his resumé, tailored his resumé. He attended  20 seminars. He read magazines. He read whatever it  21 took to stay current in his technical areas, and he  22 attended networking events. He made a particular  23 effort to keep his skill set current because that's  24 critical in the IT area. He testified on -- and  25 believe him or not, but he testified how he did</p>	<p style="text-align: right;">Page 1664</p> <p>1 useful for you as well.  2 I've reserved a few minutes in case I  3 want to come back and respond to IBM's closing, and at  4 that point I'll also address the question of Mr.  5 Castelluccio's damages. Again, we sincerely thank  6 each of you for your attentiveness.  7 THE COURT: Thank you, Mr. Carta.  8 Mr. Fasman?  9 MR. FASMAN: Thank you, Your Honor.  10 Ladies and gentlemen. Gentleman, right? That's how  11 we're doing it?  12 I too wanted to express my gratitude, the  13 gratitude of my team at counsel table and also IBM for  14 your attentiveness. It's tough to take two weeks off  15 from your normal work and your normal routines, and  16 this has been a big sacrifice, and it's always  17 gratifying to see that people are willing to do it,  18 and it's also interesting, you guys are the most  19 attentive jury I've ever seen, too. You guys are  20 taking notes to the end. This is great. You must all  21 have been A students at some point. But it's great.  22 So I'm tempted to stand up here and say  23 okay, you know what I'm going to say, sit down, but I  24 think that won't be done. But we do, all kidding  25 aside, we do appreciate it, and it's really gratifying</p>
<p style="text-align: right;">Page 1663</p> <p>1 everything he could to find a job.  2 While you're deliberating, you'll have an  3 opportunity to review the three spreadsheets that he  4 prepared detailing these efforts. Those were the  5 spreadsheets that I asked Dr. Sodikoff about earlier  6 today. You'll remember Dr. Sodikoff had not even seen  7 the spreadsheets, or if he had, he hadn't studied  8 them, and his background on the efforts that had been  9 made by Mr. Castelluccio was entirely incomplete.  10 It's up to you to decide whether Mr.  11 Castelluccio made a reasonable effort to find a job.  12 I believe even applying the standards set forth by Dr.  13 Sodikoff, that Mr. Castelluccio made a sustained  14 effort. He participated in networking, and he made  15 full use of multiple different resources. He also  16 employed a strategy with respect to his resumé that I  17 believe Dr. Sodikoff agreed was a sound approach.  18 The last exhibit that -- exhibits,  19 rather, that I'd like to make reference to are two  20 chronologies. They will also be in the front of your  21 book. There is a lot of information, and again, I  22 appreciate the fact that you have been incredibly  23 attentive, but these chronologies are intended to try  24 to help you keep things in sequence. And I understand  25 that IBM has prepared a similar chronology and that's</p>	<p style="text-align: right;">Page 1665</p> <p>1 as a lawyer to see that.  2 Mr. Carta mentioned a chronology that  3 he's going to have in his book. We've prepared two  4 chronologies and I think a chart. We'll put that up  5 in a moment, but you'll have those in the book to try  6 to help you put together the timetable, although I  7 suspect that you guys already have your timetables  8 worked out, and I'll walk through that in a few  9 minutes.  10 But I want to start with something I said  11 in my opening statement. In my opening statement I  12 said two things. This is an age discrimination case  13 in which Mr. Castelluccio has to prove to you that his  14 termination on June 30th, 2008 was due to his age.  15 And I asked you to listen very carefully throughout  16 the case for any evidence of age discrimination. And  17 I said, I didn't think you'd hear any, and that you  18 would ultimately find that was the case.  19 It's now the end of the trial, and I ask  20 you what you have heard. You certainly have heard a  21 lot about WellPoint and the problems we had with that  22 account. I'm sure you're sick of hearing about that.  23 You've heard every IBM acronym there is.  24 You've also heard a lot about events that  25 happened a long time ago before the termination that</p>

<p style="text-align: right;">Page 1666</p> <p>1 Mr. Castelluccio claims are unfair, are contrary to  2 IBM policy. Mr. Carta was up here and said you can  3 infer age discrimination from everything that Mr.  4 Castelluccio disagrees with or thinks was wrong. But  5 did you hear anything that linked any of those acts to  6 his age? And that's the question you've got to, if  7 you're the going to rule for him, find all of this  8 happened to him because of his age.  9 In Mr. Carta's opening statement he said,  10 at the start of this case, and I agree with him here,  11 that this case is about motive. Why was he treated in  12 this fashion? And the question you will have to  13 answer in a few minutes is whether Mr. Castelluccio  14 has proven to you that he was terminated because of  15 his age. That's the question. Not whether he was  16 treated in accordance with IBM policy or treated  17 fairly in the abstract.  18 Now, was there any proof that Mr.  19 Castelluccio was terminated because he was 60 years  20 old? Isn't that a little hard to believe when his  21 replacement on the WellPoint account, Gordon Crawford,  22 who you met yesterday, was 59? Why would IBM fire  23 somebody who was 60 and bring in his replacement,  24 somebody who's 59? That just doesn't make any sense.  25 Make no mistake, Gordon Crawford, who you</p>	<p style="text-align: right;">Page 1668</p> <p>1 you'd see something there.  2 It's also highly significant that Ms.  3 Collins-Smee reached out to Mike Morin, who as you  4 heard resigned from DPE at WellPoint, but who was a  5 great employee. She reached out and tried get Mike to  6 stay with IBM, was ultimately successful, along with  7 other people, and more power to her, and to him. He  8 had a wonderful career.  9 When she reached out to him he was 56  10 years old. Why is she reaching out to somebody who's  11 56, firing somebody who's 60, and she's engaged in age  12 discrimination with regard to the 60 year-old but not  13 to Mike, who's 56? I mean this makes no sense.  14 And I'm sure that you saw also in terms  15 of IBM's age discrimination record that Mr. Mandel,  16 who conducted the open door in this case, was 68 years  17 old. So I guess the answer is if IBM engaged in age  18 discrimination, we're not doing much of a job of it.  19 Mr. Carta claimed in his opening  20 statement that Ms. Collins-Smee was engaged in a  21 17-month long campaign to rid IBM of Mr. Castelluccio  22 because he was 60 years old. What evidence is there  23 of that, of this 17-month long campaign? The alleged  24 comments about retirement that Mr. Castelluccio claims  25 Ms. Collins-Smee made to him on three isolated</p>
<p style="text-align: right;">Page 1667</p> <p>1 met, this was not a cosmetic hire. Gordon Crawford  2 was the real deal. He fixed WellPoint. He made it  3 into a premier IBM client. You heard him, you saw  4 him, and you can judge for yourself his qualifications  5 and his credibility. He was a highly qualified  6 executive who did for IBM and WellPoint what Mr.  7 Castelluccio could not and did not do.  8 Now, I said in my opening statement that  9 IBM was not Facebook. We've been around for a hundred  10 years, and it was not in the midst of a youth  11 movement, and you've seen that.  12 Let me ask -- Jean, can you -- so we put  13 this chart up yesterday, I think, through Mr. Holmes,  14 and this will be in your notebook, too. You'll see  15 this.  16 But if we were engaged -- if Joanne  17 Collins-Smee was engaged in a youth movement, these  18 would be entirely different. Wouldn't they? If she's  19 trying to get rid of the older people and bring in the  20 younger people, you would see by 2011 that she had  21 more younger people. Well, she didn't. She didn't.  22 These are the executives, the Band C and  23 Band D executives who reported to her in ITD Americas  24 just in this time frame, and these people were the  25 same age. If we're engaged in age discrimination,</p>	<p style="text-align: right;">Page 1669</p> <p>1 occasions between February 2007 and June 2008, a  2 period of just less than 18 months? Is that their  3 entire proof of age discrimination? Those three  4 comments?  5 Mr. Carta would like you to believe, in  6 fact, that everything she did, everything she said,  7 you could infer age discrimination from this treatment  8 that Mr. Castelluccio didn't like, you can infer age  9 discrimination treatment from the things that Mr.  10 Castelluccio didn't like. But how do you link it to  11 age? How do you link it to age? There's no linkage  12 to age. There's no mention of age, other than those  13 three comments.  14 Ms. Collins-Smee, you heard her testify  15 at length, entirely denies making the comments Mr.  16 Castelluccio claims. And she testified, and I think  17 with complete credibility, that she brought up  18 retirement with Mr. Castelluccio in November 2007,  19 when she told him Gordon Crawford was going to replace  20 him on WellPoint, and she said, What do you want to  21 do? Do you want to find another job? You're eligible  22 for retirement. What's your pleasure? And he said, I  23 want to continue working. She didn't have a position  24 for him at the time, but she said okay, we're all in,  25 let's go find a job. That was that. And she did just</p>

<p style="text-align: right;">Page 1670</p> <p>1 that.</p> <p>2 And she testified she mentioned</p> <p>3 retirement in May 2008, when she said, Look, it's been</p> <p>4 five months, you've been on the bench for five months,</p> <p>5 I don't have a position for you, and in 30 days if we</p> <p>6 don't find a position for you, we'll have to terminate</p> <p>7 you, and you're retirement eligible. And that was it.</p> <p>8 That's it. She admitted both of those comments.</p> <p>9 There's nothing wrong with that. She</p> <p>10 certainly never asked him how old he was. The first</p> <p>11 time he and she met, as he alleges, the first word out</p> <p>12 of her mouth were "How old." Well, that's just</p> <p>13 preposterous, and the proof of that is that he never</p> <p>14 even mentioned that to Mr. Mandel in the open door.</p> <p>15 You heard Mr. Mandel on the stand yesterday. I asked</p> <p>16 him, Did he mention that to you? No, he did not.</p> <p>17 Take a look at his notes that -- Mr.</p> <p>18 Castelluccio's own notes from the Garrett Walker</p> <p>19 conversations, which are in your materials. I think</p> <p>20 our Exhibit 36, if I'm not mistaken. He doesn't</p> <p>21 mention that. He doesn't say, Her first words to me</p> <p>22 were how old are you.</p> <p>23 She didn't say that. She didn't mention</p> <p>24 retirement on multiple occasions. Those events simply</p> <p>25 did not happen.</p>	<p style="text-align: right;">Page 1672</p> <p>1 Mr. Jones testified as follows: Quote, I</p> <p>2 don't remember exactly, but my recollection would be</p> <p>3 that I discussed that with him at a minimum during his</p> <p>4 PBC review in late January.</p> <p>5 So how does he not know that he's going</p> <p>6 to be replaced as the vice president of the public</p> <p>7 sector when his supervisor, prior supervisor said I'm</p> <p>8 going to do this?</p> <p>9 Mr. Castelluccio claims he never had a</p> <p>10 conversation with Ms. Collins-Smee where he</p> <p>11 acknowledged that his VP PSD position was not working</p> <p>12 out and he wanted to move. Remember, you saw that</p> <p>13 e-mail multiple, multiple times where she sends an</p> <p>14 e-mail to Keith Holmes and says, I talked to Jim, and</p> <p>15 he understands, and he knew it was working out and he</p> <p>16 wants to move.</p> <p>17 Now, even though Kelton Jones testified,</p> <p>18 I told him that, and I told him that I was going to</p> <p>19 move him, Mr. Castelluccio accused Ms. Collins-Smee of</p> <p>20 entirely fabricating this e-mail about a conversation.</p> <p>21 We never had this conversation. But I asked him, why</p> <p>22 would she write that e-mail to Keith Holmes about this</p> <p>23 conversation? Why would she do something so bizarre</p> <p>24 and crazy? She doesn't have to do that. He had no</p> <p>25 answer to that.</p>
<p style="text-align: right;">Page 1671</p> <p>1 And I want to remind you that in 29 years</p> <p>2 at IBM Joanne Collins-Smee had never been accused --</p> <p>3 has never been accused of discrimination other than</p> <p>4 this time. She'd never been the subject of an open</p> <p>5 door investigation, and she, in fact, she had never</p> <p>6 before terminated an executive.</p> <p>7 Now, Mr. Carta was right, there are a</p> <p>8 number of direct conflicts between what Mr.</p> <p>9 Castelluccio said and what Ms. Collins-Smee testified</p> <p>10 to. But the number of times that Mr. Castelluccio</p> <p>11 didn't tell you the truth are legion. Let me just</p> <p>12 give you a few examples.</p> <p>13 He claimed -- and you'll see it on his</p> <p>14 exhibit that Mr. Carta mentioned -- he claimed he had</p> <p>15 no idea that he was going to be replaced as the vice</p> <p>16 president of the public sector division until she came</p> <p>17 over and said, in June, Miguel Echavarria's going to</p> <p>18 replace you.</p> <p>19 Now, Mr. Castelluccio's own witness,</p> <p>20 Kelton Jones, his prior supervisor, said, testified,</p> <p>21 that he intended to replace him as the vice president</p> <p>22 of the public sector, and that he told Mr.</p> <p>23 Castelluccio that he was going to do it during Mr.</p> <p>24 Castelluccio's PBC discussion in January 2007. And</p> <p>25 here's what he said, and I'm going to read it exactly.</p>	<p style="text-align: right;">Page 1673</p> <p>1 Mr. Castelluccio claimed he never knew</p> <p>2 that IBM was looking for a permanent DPE on WellPoint</p> <p>3 after he was in that position on a full-time basis in</p> <p>4 June. But remember, I showed him an exhibit, a note</p> <p>5 from his friend, Mark Franzese, who e-mails him, among</p> <p>6 other people, and says, Listen, folks -- which is in</p> <p>7 July, July 16th. Mr. Franzese -- this is our Exhibit</p> <p>8 Number 61.</p> <p>9 And he says, Everybody, I interviewed for</p> <p>10 Mike Morin's job at the request of the client, and the</p> <p>11 client -- and I didn't take it, and the client was</p> <p>12 going to interview Bob Jones, another IBMer.</p> <p>13 When I asked Mr. Castelluccio about that,</p> <p>14 I said, So what about this? He said, Oh, you know,</p> <p>15 Mark Franzese, he was just running around, and I don't</p> <p>16 know who Bobbie Jones was, and I discounted whatever</p> <p>17 Mark said.</p> <p>18 I mean, there were a litany of excuses,</p> <p>19 but the fact is, he well knew that people were coming</p> <p>20 in and interviewing for that position.</p> <p>21 As to Ms. McDonald, he accused her of</p> <p>22 fabricating conversations with him as well. You saw</p> <p>23 there was an exhibit where Ms. McDonald said, Jim,</p> <p>24 this is not working out. Or it's the one to Boxer</p> <p>25 where she said, I spoke to Jim, it's not working out,</p>



<p style="text-align: right;">Page 1674</p> <p>1 he knows it, and he knows he's temporary. Why she 2 would fabricate that in an e-mail to Mark Boxer, I 3 don't know.</p> <p>4 He testified twice to you under oath that 5 all of the entries on his spreadsheet, the one that 6 Mr. Carta wants you to look at, the ones of all the 7 things that he did to find a new job, were entered 8 contemporaneously with the events, but when I asked 9 him, when did you start keeping this Excel 10 spreadsheet, he said, as he testified in his 11 deposition, I started keeping that in the spring of 12 2010.</p> <p>13 Of course when you go and look at it, as 14 I showed you on the screen, and as you'll see when you 15 look at it, there are hundreds of events from 2008 and 16 2009. How you can contemporaneously keep records of 17 things that happened two years earlier is a little bit 18 difficult to understand.</p> <p>19 And, perhaps most important, he 20 conveniently forgot to tell you during his direct 21 examination that Joanne Collins-Smee initially gave 22 him a 3 rating on his PBC in 2008, even though that 23 was the basis of his initial complaint to Garrett 24 Walker. And you can look, that's Defendant's Exhibit 25 76.</p>	<p style="text-align: right;">Page 1676</p> <p>1 who was not working out. And that's all Ms. 2 Collins-Smee ever did.</p> <p>3 She never said, You should retire. He 4 didn't say -- he never testified that she pressured 5 him to retire; that she said, Jim, I think you're too 6 old, you need to retire. She just said retirement's 7 an option. Is that something you want to pursue?</p> <p>8 Second, comments that are not close in 9 time to the event in question -- and here the 10 termination occurred in June 2008 -- are mere stray 11 remarks which don't prove anything. Comments made 17 12 months before the event, like Mr. Castelluccio alleges 13 about this how old comment, which we deny that she 14 never made, they don't prove -- they prove absolutely 15 nothing. They can't affect everything that was done 16 thereafter. That's not the way it works.</p> <p>17 So let's -- I want to return now to the 18 termination for a few minutes. And here the facts are 19 pretty much undisputed. Mr. Castelluccio was removed 20 from the WellPoint account because of client 21 complaints. You've certainly seen and heard multiple 22 examples of that. And there were no open positions 23 for him at that time. He sought other work. Ms. 24 Collins-Smee tried to help him, changing his PBC 25 rating when she shouldn't have done so, but he didn't</p>
<p style="text-align: right;">Page 1675</p> <p>1 And more important, he did that after 2 swearing in his oath to tell you the truth, the whole 3 truth, and nothing but the truth. I had to get up 4 here and say, let's talk about your PBC rating, you 5 didn't even mention the 3 that Joanne Collins-Smee 6 intended to give you.</p> <p>7 Now, you're the judges of the facts, but 8 I would ask you to bear in mind, and I think Judge 9 Smith will so instruct you, that where a witness is 10 sworn to tell the truth, the whole truth and nothing 11 but the truth and they violate their oath of office, 12 their oath, their version of events can't be believed.</p> <p>13 Now, I want to clarify a couple of legal 14 issues right at this point. The first thing is the 15 law does not forbid a discussion of retirement. It's 16 not age discrimination to inquire about plans for 17 retirement. Congress when it passed the Age 18 Discrimination and Employment Act back in 1967 did not 19 outlaw all discussion of age or retirement. The law 20 prevents companies from terminating people on the 21 basis of age, not from mentioning age or retirement.</p> <p>22 And you heard Mr. Castelluccio himself 23 admit in a video deposition clip that I played that it 24 was appropriate in his view for an IBM manager to 25 mention retirement as a possible option for someone</p>	<p style="text-align: right;">Page 1677</p> <p>1 find anything.</p> <p>2 He was given six full months, full 3 salary, to find something else, and he couldn't turn 4 anything up. He was given more time than anyone else 5 to find a position. He identified no one who got more 6 time, no one who was younger who got more time, and 7 even he said in a video clip that I played for you 8 that IBM would not go beyond six months of someone on 9 the bench. He said it wouldn't make sense.</p> <p>10 And as you heard, he entirely refused to 11 even consider a non-executive position. You heard him 12 testify when I asked him about it. He sarcastically 13 suggested that perhaps he should have taken a Band 4 14 position. He never even asked about that alternative, 15 which as you heard from Keith Holmes was very viable 16 if you wanted to remain with IBM, and that entire 17 sequence of events is simply not susceptible to being 18 age discrimination.</p> <p>19 Now, Mr. Carta just was talking about Mr. 20 Castelluccio's removal from the PSD VP job in February 21 2007. I thought they had stopped pressing that claim, 22 but I guess not. The reason it makes no sense is that 23 Kelton Jones said he was going to pull him out of that 24 job anyhow, and for the same reasons Joanne 25 Collins-Smee pulled him out of that job, that he was</p>



<p style="text-align: right;">Page 1678</p> <p>1 not responsive, and he couldn't work with David  2 Liederbach in the GTS team and function in that role.  3 I mean Kelton Jones got on the stand -- I  4 was honestly a little surprised to hear him say it --  5 but he said look, I was going to do the same thing. I  6 told Jim about it. Why were you going to do it? Same  7 reason. So how can what Ms. Collins-Smee does when  8 she does the exact same thing be age discrimination  9 where Kelton Jones said I was going to do this anyhow,  10 except that I got fired in the interim.  11 You've also seen Mr. Liederbach, Ms.  12 McDonald, they were both pressing for this action in  13 2006 before Joanne Collins-Smee ever showed up. And  14 how any of this becomes age bias on her part is beyond  15 me.  16 So where's the evidence of this 17-month  17 long campaign? Where is it? She did nothing but what  18 a responsible manager should have done in removing him  19 from these two positions.  20 And I'd like to underline two issues  21 here, because they may be important for your  22 deliberations. The first is this:  23 Prior to the trial the Court held that  24 Mr. Castelluccio didn't challenge his removal from the  25 two prior positions, the VP PSD position and the</p>	<p style="text-align: right;">Page 1680</p> <p>1 he's proved to you that his termination was  2 attributable to his age, that he would not have been  3 terminated had he been younger.  4 Now, I've been trying cases in front of  5 juries for a long time, and I know jurors want to do  6 the fair thing, and we don't suggest that you do  7 anything that is unfair. We think that the record  8 shows that Mr. Castelluccio was treated fairly,  9 justly, and generously by IBM. But Mr. Castelluccio  10 and Mr. Carta tried this not as an age discrimination  11 case, but as if this were a union grievance, that  12 everything that happened to him was wrong; it's wrong,  13 therefore you can infer age discrimination. That's  14 not the way it works. You have to prove age  15 discrimination. You have to prove not that something  16 was wrong, but it was caused by Mr. Castelluccio's  17 age.  18 And they tried this case in an effort to  19 appeal to your sympathy. Instead of proving that he  20 was terminated because he was 60 years old, they tried  21 to get you to feel sympathy for him. Mr. Castelluccio  22 wept on the stand by my count four different times.  23 But sympathy doesn't prove age discrimination. And  24 the Judge will instruct you about sympathy and what --  25 and its role in this case, which is zero. But please</p>
<p style="text-align: right;">Page 1679</p> <p>1 WellPoint position. He didn't challenge them in the  2 complaint. And I said this to you in the opening  3 statement, I'm not sure that it registered at the  4 time, but those removals actually are not before you.  5 The evidence about them is background. You can't  6 render a verdict in his favor on those things because  7 they are not in the case.  8 So all of that evidence you heard about  9 WellPoint, and I'm sure you're delighted to hear this  10 right now, about WellPoint, is background evidence in  11 this case. And you can place whatever weight on it  12 you deem appropriate, which means you can disregard it  13 if you choose to do so.  14 But we believe the evidence that you  15 heard about how he was treated and the removals from  16 these positions showed that he was -- that IBM acted  17 properly. But the issue -- the only issue before you  18 is his termination in June 2008.  19 And second, as you will hear in a few  20 minutes, it's not enough for Mr. Castelluccio to prove  21 that he was somehow treated unfairly. That's not the  22 case. But it's important to remember that Congress  23 didn't outlaw all unfair treatment, it outlawed age  24 discrimination. You can only rule for Mr.  25 Castelluccio and you can only award him damages if</p>	<p style="text-align: right;">Page 1681</p> <p>1 listen carefully to what Judge Smith has to say about  2 this in a few minutes.  3 The bottom line is this: IBM has the  4 right to run its business as it sees fit as long as it  5 doesn't discriminate. It has the right to change its  6 delivery systems. It has the right to replace Tony  7 Messina and Kelton Jones with Bob Zapfel and Joanne  8 Collins-Smee, and it has the right to expect Jim  9 Castelluccio to do his job as instructed, not the way  10 he wants to do his job. It had the right to replace  11 him as it did, and it had the right to terminate him.  12 And you swore an oath at the start of  13 this case to apply the law as given to you. That law  14 requires you to answer one question and one question  15 only, and that is, has Mr. Castelluccio proven to you  16 that he was terminated because of his age, and unless  17 you answer that question in the affirmative, if the  18 answer to that question is no, then this case is over.  19 Now, I want to talk for a few minutes  20 about their claim -- Mr. Castelluccio's claim that  21 Joanne Collins-Smee didn't do enough to find Mr.  22 Castelluccio a new position. You saw that she put him  23 on various drills. She recommended him for a variety  24 of positions. She gave him a 2 that she shouldn't  25 have given him to get him a job. One of our charts</p>

<p style="text-align: right;">Page 1682</p> <p>1 shows how frequently he was on these drills.  2 You'll have these in your materials, and  3 I hope you can see this, but all of these green -- the  4 green references are all to the drills that he was on.  5 Now, were there other drills?  6 Can you see that? You want me to bring  7 it over? You'll see this in the jury room and you'll  8 have that identical chart in the notebook.  9 But the point is this: Yes, there were a  10 lot of drills that were Pat Kerin's drills, that's  11 right. There were Joanne Collins-Smee's drills.  12 There were Zapfel drills. He's put on these drills  13 beginning in June 2007, and he's kept on these drills  14 throughout. I mean it's not like he wasn't on any of  15 these drills.  16 Did she do anything for him less than she  17 did for a younger employee? No. Is there any proof  18 that he was treated differently because of his age?  19 No. Why would you believe that any of this had to do  20 with the notion that he was 60 years old? Those three  21 comments, that he alleges she made, is that it? Is  22 that the basis? That infects everything she ever did  23 thereafter, that's what they want you to believe.  24 Everything that followed from Mr. -- as soon as she  25 mentioned retirement, it's all -- everything she did</p>	<p style="text-align: right;">Page 1684</p> <p>1 So he sends out six e-mails, she sends  2 out four, she makes more inquiries. They're about  3 even. The difference is he's on the bench and has no  4 job responsibilities, she's supervising 20,000 people  5 and handling every strategic outsourcing contract in  6 the United States and Canada at the same time.  7 And I would urge you to take his claim --  8 to take Mr. Castelluccio's claim that he reported to  9 work every day and knocked on doors every day with a  10 large grain of salt. Ms. Collins-Smee denied this.  11 And you saw the video clip that I played from his  12 deposition where I said, What did you do during this  13 period of time? And he said, It was a difficult time,  14 and I took more personal time off during that six  15 months than I ever took before in my career.  16 Finally, recall what Mr. Castelluccio has  17 said about these drills. He claimed he had to depend  18 on Ms. Collins-Smee, seeking to convince you that the  19 failure to find a job was her fault, not his. But  20 remember, I asked him why he had to depend only on her  21 when he knew Bob Zapfel so well. Remember he was  22 talking about, he was on the phone with Zapfel, Zapfel  23 had his cell phone number, I work with him, blah blah  24 blah.  25 And Keith Holmes testified yesterday, I</p>
<p style="text-align: right;">Page 1683</p> <p>1 wrong is due to his age. That's not the law.  2 In looking at this issue, and the  3 question of the 5-minute drills -- I'm sure you heard  4 enough of that, too -- but in looking at this issue I  5 want to remind you of the one phrase that IBMers know  6 as soon as they get there, which is, "Your career is  7 your responsibility," and Mr. Castelluccio was  8 ultimately responsible for finding his own position  9 within IBM.  10 He wants you to believe that his failure  11 was not his fault, but look at the record. We  12 found -- we were able to locate six e-mails that he  13 sent in the six months that he was on the bench  14 looking for another position. Six, in six months.  15 They are -- I'll say this slowly -- Plaintiff's  16 Exhibits 71, 73, 74, 88, 110, and 111. That's six  17 from him.  18 You've seen four e-mails from Joanne  19 Collins-Smee, or Connie Murphy at her instruction.  20 Those are Defendant's Exhibit 116, 124, 128, and  21 Plaintiff's Exhibit 90. Along with testimony from  22 Joanne Collins-Smee and Keith Holmes that she sought  23 out additional positions for him during multiple  24 5-minute drills, and you saw evidence that she did  25 that in the exhibits that you saw before you.</p>	<p style="text-align: right;">Page 1685</p> <p>1 asked him, Was it appropriate for somebody in Mr.  2 Castelluccio's position to approach Bob Zapfel if he  3 knew him? And Keith said, Of course, people do it all  4 the time. Did Mr. Castelluccio do this? No, he did  5 not.  6 Now, before I asked the question of Mr.  7 Castelluccio, he had told you about how -- what good  8 friends he and Zapfel were, but I asked him then,  9 Well, why didn't you contact Bob Zapfel when you were  10 looking for a job? Why didn't you do that? And he  11 said, only, that Bob Zapfel was not his manager,  12 Joanne Collins-Smee was his manager, and he used that  13 same phrase several times.  14 But does that answer anything? You know  15 Zapfel was conducting these drills, and he's  16 apparently friendly, and he doesn't call him up?  17 Remember what Gordon Crawford testified  18 yesterday? He said -- he testified that his deal in  19 England was ending, and who did he call? He called  20 Bob Zapfel, and he sat down with him and he said, Bob,  21 my deal in England is ending, I need to find a new  22 role, help me find a new role. And he ended up at  23 WellPoint. I'm just going to leave it right there.  24 There was a little bit of discussion, and  25 you'll see in Mr. Carta's exhibits, IBM's allegedly</p>

<p style="text-align: right;">Page 1686</p> <p>1 offering shifting reasons for the terminations. Look,  2 I think you've heard plenty. Both of those reasons  3 are absolutely clear. For poor performance he was  4 pulled off of those two positions. For poor  5 performance he was put on the bench. He was told he  6 needed to find another job. He didn't find another  7 job after six months. IBM said we can't carry you  8 forever. Thanks very much, but we can't go -- this  9 can't go on. They're both true. They're both  10 accurate. They're both related, and there's nothing  11 wrong with that situation.</p> <p>12 Now, you also heard Mr. Castelluccio  13 claim that Ms. Collins-Smee should have hired him for  14 one of those seven positions. You saw the e-mail with  15 the seven positions while he was on the bench. But  16 she also testified that she wanted to hire the best  17 people, and explained to you in detail why she told --  18 she chose the people that she did. They were all 20  19 plus year veterans of IBM, and all had recent subject  20 matter expertise for the jobs into which they were  21 hired.</p> <p>22 And it's very significant that Mr.  23 Castelluccio didn't say he was better qualified than  24 any of them. When I asked him, I said, Were you  25 better qualified than these people? No, I was equally</p>	<p style="text-align: right;">Page 1688</p> <p>1 period. Joanne Collins-Smee rated him a 2. That's  2 it. But the fact is whether he was rated a 2, a 1, a  3 3 or a 4, he was pulled off of two accounts in 2007  4 for poor performance. IBM didn't have to ignore those  5 events, no matter what his ratings were.</p> <p>6 Mr. Carta -- this sounds a little bit  7 like the Wizard of Oz, where the wizard is there  8 working the levers and saying don't look at the man  9 behind the curtain. Right? Don't look at that stuff.  10 Don't look at what actually happened. It's a 2.  11 That's the rating. You don't have to think about it,  12 and don't worry about all this other stuff that  13 actually happened. He was a solid contributor.  14 That's it. While it's said you can call a lion a  15 leopard, but the leopard still has spots. And here  16 Mr. Castelluccio had very serious performance problems  17 in 2006 and 2007, and no PBC rating obliged IBM to  18 ignore those problems.</p> <p>19 So the evidence, the facts in this case  20 show no age discrimination, and we ask you to render a  21 verdict in IBM's favor.</p> <p>22 Now, I have to shift over and say a few  23 words about damages. My answer on damages, my short  24 answer to you, and my request to you, is don't worry  25 about them. There's no evidence of age</p>
<p style="text-align: right;">Page 1687</p> <p>1 qualified with them.</p> <p>2 When a plaintiff claims discrimination  3 based on comparing qualifications, they have to prove  4 that they were better qualified, that no one  5 exercising a judgment -- no reasonable person would  6 have chosen the person instead of them. He hasn't  7 even made that claim.</p> <p>8 Mr. Carta also mentioned that he was sent  9 to WellPoint in an effort -- he was set up to fail  10 there. He was not set up to fail there. He was an  11 expert in troubled accounts by his own admission. He  12 was very experienced. And you heard everybody, you  13 heard Liederbach, you heard Keenie McDonald, you heard  14 Keith Holmes, you heard Joanne Collins-Smee all say  15 the same thing. We sent him there, we thought he  16 could handle one account instead of 30 in the  17 portfolio, and they would have applauded if he had  18 done what Gordon Crawford did. They were looking for  19 somebody to solve that account. He didn't do it. So  20 they got somebody else in there, 59 year-old Gordon  21 Crawford and he did it.</p> <p>22 So I want to emphasize one more thing  23 about these qualification issues. And it goes  24 throughout this case. Mr. Carta has said, Mr.  25 Castelluccio was rated a 2. He was a solid performer,</p>	<p style="text-align: right;">Page 1689</p> <p>1 discrimination, there's no damages. But I have to  2 address this issue in any event. And I do it out of  3 an abundance of caution.</p> <p>4 So first let me state the obvious, and I  5 hope you guys all know this, but I've actually  6 interviewed a couple of jurors after a trial who said  7 gee, I wish you'd said that during trial. You can't  8 render a verdict for Mr. Castelluccio, you can't give  9 him damages unless you find age discrimination. Can't  10 be based on sympathy. You have to find a violation of  11 the law before you ever get to damages. And if I just  12 said something you know, I apologize.</p> <p>13 Now, Mr. Castelluccio's proof of damages  14 rests upon his expert witness, Dr. Crakes. You heard  15 Dr. Crakes on the stand the other day. I thought that  16 his testimony was entirely without foundation and was  17 absolutely incredible. He made numerous mistakes.  18 Let's talk about them.</p> <p>19 He used the wrong age. It was based on  20 age 66. Mr. Castelluccio testified before you on two  21 occasions, I intended to retire at age 65. That's a  22 big deal. That's a big deal.</p> <p>23 You'll also recall that Dr. Crakes  24 said -- I asked him during his deposition, and he  25 acknowledged in his testimony, I said how many times</p>

<p style="text-align: right;">Page 1690</p> <p>1 have you used 65 or 66 or 70 in your other studies?  2 He's done thousands of these studies. He said, I  3 actually never used 66 before, I used 65, sometimes I  4 use 70.  5 And the report's just in error. I mean  6 it is just in error. And it's not a rounding error.  7 I mean it's hundreds of thousands of dollars. I think  8 Mr. Carta said it was about \$290,000 a year. That's  9 not a rounding number. That's big deal stuff.  10 What else did he do wrong? He didn't  11 deduct Mr. Castelluccio's pension payments from the  12 back pay award. Judge Smith will instruct you in a  13 few minutes that pension payments have to be taken off  14 an award. The reason for that's pretty simple. You  15 can't both work and collect a pension. Right? So if  16 the thought is he should have been working, you have  17 to give back the pension payment. It's double-dipping  18 otherwise. Okay?  19 And I asked Dr. Crakes, I said, You did  20 this in a prior study in this case? And he said Yes,  21 I did. And I asked him why he didn't in this case,  22 and here's his answer. He said, "The calculation of  23 economic loss is based upon the loss to Mr.  24 Castelluccio subsequent to his termination. Any  25 pension benefits that he's received from that point of</p>	<p style="text-align: right;">Page 1692</p> <p>1 Castelluccio could have been playing in the NBA. He  2 had no idea what the actual facts were.  3 But most importantly, what he also didn't  4 do was account for alternative earnings, for  5 mitigation of damages. And I asked him, Do you do  6 this in every employment case? And he said Yes.  7 Mitigation in damages works like this.  8 It's a simple concept of law. If you hire somebody to  9 paint your house, they don't show up, you can't let  10 your house fall apart and then sue the painter who  11 didn't show up for the value of the house. You got to  12 get somebody else in to paint your house so it doesn't  13 fall down, and then you sue the painter not for the  14 value of the house, but for what you paid to the  15 second painter. That's called mitigation of damages.  16 In the employment setting what that means  17 is that if you're terminated and you're seeking to  18 recover back wages, you have to do everything that you  19 can to get another job, and that minimizes your  20 damages. That's how that works in the employment  21 sector. And it's something that's done in every case.  22 I asked Dr. Crakes why he didn't consider  23 that issue, and he said, Well, Mr. Carta's associate,  24 back in 2010, told me not to consider that issue. But  25 he had no factual basis for ignoring alternative</p>
<p style="text-align: right;">Page 1691</p> <p>1 termination would be based on his employment and  2 efforts prior to that termination itself, so I did not  3 subtract any value for pension benefits associated  4 with the work that I performed up to the point of his  5 termination."  6 I don't know, maybe you got that, but I  7 didn't, and I've read it a whole bunch of times. I  8 don't know what he said there.  9 But this, too, this is not a rounding  10 error, either. I mean Mr. Castelluccio testified his  11 pension is equal to \$78,000 a year, and under Mr.  12 Crakes' -- Dr. Crakes' study, if you used 4.67 years,  13 which takes him to age 66, which is wrong anyhow, but  14 multiplying that out, it's over \$360,000. That's a  15 lot of money for an expert to be off.  16 What else did Dr. Crakes do wrong? He  17 admitted he didn't make any investigation of the facts  18 of this case. Remember I asked him, I said, Do you  19 know how IBM evaluates performance? Do you know how  20 it awards bonus? Do you even know what kind of case  21 this is? He said, No, I don't know it's an age  22 discrimination case. I know it's an employment case.  23 He simply relied upon instructions he  24 received from Mr. Carta's office. He never did any  25 independent verification. For all he knew, Jim</p>	<p style="text-align: right;">Page 1693</p> <p>1 earnings.  2 He's not an expert in recruiting like Dr.  3 Sodikoff is. He's not in a position to say, well, I  4 thought he couldn't get a job until he was 66 or 65,  5 or whatever. There's no basis for doing that in this  6 case.  7 And there is no basis for concluding that  8 someone with Mr. Castelluccio's career wouldn't be  9 able to find a job if he had gone about it in the  10 right way. You heard from Dr. Sodikoff this morning.  11 He testified that Mr. Castelluccio was doing this in  12 the entirely wrong way. He was depending exclusively  13 on ExecuNet, or almost exclusively on ExecuNet and  14 NetShare. That wasn't sufficient for finding a job.  15 That's -- in the corporate world, that's the  16 equivalent of looking through want ads.  17 And I asked Mr. Castelluccio at his  18 deposition, and he testified on the stand, I said, How  19 many interviews, face-to-face interviews in five years  20 did you get through using ExecuNet? And do you  21 remember what he said? None. He was hoping for one.  22 He got none.  23 Now, there's something wrong with a job  24 search that produces no interviews in five years. And  25 in a tough economy, in 2008 we all know this was a</p>



<p style="text-align: right;">Page 1694</p> <p>1 tough economy, you can't just sit at home and do  2 internet searches and expect to get a job. You all  3 know what you have to do. You have to get out there.  4 You have to work at it.  5 You heard Dr. Sodikoff testify this  6 morning, there are five steps to this. It's a job.  7 You have to go out and you have to network.  8 And remember, I asked Mr. Castelluccio on  9 cross-examination, I said, Mr. Castelluccio, you must  10 have had a huge Rolodex. You had 40 years at IBM.  11 You worked throughout the entire IT industry in  12 America. Why didn't you get on the phone and call the  13 people at WellPoint, call the people at United  14 Healthcare? You ran through a whole list of  15 generalists. Why didn't you call them up, take them  16 to lunch, see what they had?  17 Remember what he testified in response?  18 He said, I mistakenly thought I had a covenant not to  19 compete with IBM. So I didn't think I could do so.  20 And I asked him, Did you check? You're  21 looking for a job, you should check. No, he didn't  22 check. The whole reason -- do you think he was  23 serious about getting a job? Or do you think he was  24 going through the motions? Sitting at home and using  25 ExecuNet.</p>	<p style="text-align: right;">Page 1696</p> <p>1 And you heard Keith Holmes yesterday  2 testify that when he lost a job and couldn't find  3 anything, that's exactly what he did. He did, and he  4 got a job, and there was no reduction in salary. Mr.  5 Holmes is still with IBM today. He's a Band 10, even  6 though his executive level job was eliminated.  7 You'll also recall that Mr. Holmes  8 testified that Band 10 positions have substantial  9 responsibilities and often have high salaries. The  10 salary figure he used for 2009, the highest Band 10  11 was being paid \$395,000 a year, which is not bad. And  12 Mr. Holmes testified that under IBM policy, if Mr.  13 Castelluccio had obtained the Band 10 position, the  14 worst that would have happened was he would have taken  15 a 10 percent cut in salary. And Mr. Castelluccio  16 never even inquired about that policy.  17 Now, I want you to think about this when  18 Mr. Carta talks about damages. He's asking you to  19 award his client millions of dollars, but he wouldn't  20 let -- Mr. Castelluccio wouldn't even consider bidding  21 on an IBM job that would at worst have resulted in a  22 10 percent cut in salary. Millions of dollars in  23 damages, I find it hard to believe that any reasonable  24 jury would consider doing that, and I trust that you  25 are all reasonable people.</p>
<p style="text-align: right;">Page 1695</p> <p>1 Now, consider the chart of what he did,  2 which I mentioned a few minutes ago. As I said, he  3 created it in the spring of 2010. It's got hundreds,  4 hundreds, not one or two, but hundreds of events in  5 2008 and 2009. I mean how can they be accurate based  6 on the spreadsheet?  7 And you'll recall I objected to that  8 chart, and I said we've asked for the backup, where is  9 the backup? Show me anything. Show me one piece of  10 paper that supports these entries on this chart. You  11 got some ExecuNet resumés. Let's put those aside.  12 Show me a piece of paper that said you went to one of  13 these conferences. Nothing. We never got anything  14 back. So I think that chart is about as -- worth  15 about what's the paper it's written on.  16 But here's the most important question  17 with regard to mitigation of damages, and whether he  18 was looking for work seriously. He never even  19 considered looking for a Band 10 position at IBM to  20 remain in the work force.  21 And you'll recall, those jobs are posted.  22 Any IBMer can go find them. You didn't need Joanne  23 Collins-Smee to find them for him. He could have  24 taken a look and he could have been on one of those  25 jobs.</p>	<p style="text-align: right;">Page 1697</p> <p>1 In fact, what Mr. Carta will tell you in  2 a minute is that not only is he asking you to do that,  3 but he's asking you to double it on the grounds that  4 IBM acted willfully in this case. To act willfully,  5 IBM, it's not enough to violate the law, you have to  6 act with reckless disregard for whether your conduct  7 violates the law. And that is just not the case here.  8 And the proof of that is not only that  9 IBM acted lawfully, but it absolutely did not act with  10 reckless disregard. In fact, it did just the  11 opposite.  12 What did it do? When Mr. Castelluccio  13 filed an internal complaint of discrimination, IBM did  14 a complete investigation of that complaint. It  15 followed procedures that it established long ago to  16 make sure it doesn't violate the law. IBM takes its  17 commitment to comply with the law very seriously. It  18 employs departments of people to deal with these  19 issues. That's Russ Mandel's job. You met him.  20 That's all he does. And you'll see when you look at  21 the open door procedures, it's very clear, it's very  22 heavily regulated.  23 And I would emphasize to you as in an age  24 discrimination case, Mr. Mandel, as I said before, is  25 68 years old. He interviewed 20 witnesses in addition</p>



<p style="text-align: right;">Page 1698</p> <p>1 to Mr. Castelluccio. IBM followed its normal 2 procedures, investigated Mr. Castelluccio's complaint 3 carefully, and made sure it complied with the law, and 4 there's no conceivable way that IBM's conduct was in 5 any way reckless or undertaken with disregard for 6 whether its conduct violated the law. 7 Now, let me switch gears. I want to put 8 all the legal stuff away, and I want to talk to you 9 about what may actually have happened here, and try to 10 pull this together. So let's go back. 11 Mr. Castelluccio was used to working with 12 Tony Messina and with Kelton Jones. Those two guys 13 largely invented the delivery business at IBM. They 14 were there for a long time. He was used to working 15 with them. He liked how they worked. He liked and 16 respected them. He was, to use his own words from 17 notes with Garrett Walker, as our Exhibit 36, part of 18 the Messina-Jones regimen. 19 Tony Messina and Kelton Jones were fired 20 in early 2007, January 2007, and they were fired, and 21 at the same time IBM changed how the delivery 22 operation worked. They were replaced by Bob Zapfel 23 and Joanne Collins-Smee. 24 Joanne Collins-Smee was younger and had 25 less delivery experience than Mr. Jones or Mr.</p>	<p style="text-align: right;">Page 1700</p> <p>1 WellPoint. He's working on the -- for the early part 2 of the year as vice president PSD, and he starts 3 cashing out his options, and then that continues the 4 next year at length. 5 So put up the actual chart where you can 6 see this. And let's enlarge that portion. 7 This, too, you'll have in your notebooks. 8 But look at the dates, when he's doing 9 this. 4/24, 10/15. This is '07. 12/10. The first 10 two of those dates he's not on the bench. He's not 11 told, according to him, that he's even going to not be 12 at WellPoint anymore. And he keeps going in '08, 13 3/12. He's on the bench. Nobody said anything. 14 5/08, that's before she gives him -- says there's 15 going to be a package prepared. 16 What's he doing? I have to say -- and I 17 think this is obvious, but let me say it again. You 18 hold on to options because the stock market -- except 19 in 2008 when it went like this, generally the stock 20 market goes up, and you have a right to buy a share of 21 IBM stock at whatever it is, 60 dollars, 80 dollars or 22 whatever, and whatever the marketplace is, it's better 23 if it's higher, so people hold on to their options. 24 Why cash these things out? I mean I saw this and I 25 said, what's going on here?</p>
<p style="text-align: right;">Page 1699</p> <p>1 Messina. You heard Mr. Carta ask her, one of his 2 initial questions to Joanne was whether she had any 3 delivery experience at all. She had substantial 4 delivery experience. Not as much as Jones. But the 5 question Mr. Carta asked showed exactly what his 6 client thought about her level of experience. 7 So all of a sudden Mr. Castelluccio goes 8 from working for a man he respects to a woman he 9 doesn't believe knows the business. And to make 10 matters worse, Ms. Collins-Smee pulls him out of his 11 vice president position within a month of her arrival 12 on the job. Of course Kelton Jones was going to do 13 that, but it's still easy to understand why Mr. 14 Castelluccio was upset and frustrated. 15 So what does he do? Well, he starts to 16 cash out his stock options, and to consider his 17 alternatives. Maybe he'll get a job with another 18 company, maybe he'll retire, but this new IBM 19 certainly is not working out for him. 20 Take a look at our chart. 21 Jean, can you put that up, of when he 22 cashes out his stock options? 23 Well, this -- so let me -- this will be 24 in your binders, too. But you'll recall, he starts in 25 2007. He's still working -- he's working on</p>	<p style="text-align: right;">Page 1701</p> <p>1 Let's keep on going. He gets put on 2 WellPoint, which is a tough account that requires a 3 lot of work. And even though Jim Castelluccio was an 4 expert in troubled accounts, his heart's really not in 5 it. He doesn't do much to inspire client confidence. 6 He avoids SWAT calls, Crit Sit calls, and the client 7 says, as you saw, he's invisible and MIA. Just the 8 opposite of what Gordon Crawford did. 9 Now, he says he was surprised by being 10 pulled off the WellPoint account, but that's not the 11 case. Keenie McDonald testified, Every time I had a 12 problem I told him about it. And you saw many the 13 e-mails about this. He wasn't getting it done. And 14 he knew it. 15 So he finds himself on the bench, and 16 without Tony Messina and Kelton Jones to get him a 17 job. Maybe they had the clout to place him somewhere, 18 but his new boss, Joanne Collins-Smee, doesn't. And 19 in any event, she doesn't share their high opinion of 20 him. She tries to help, but she didn't -- she can't 21 place him. 22 He doesn't do all that much on his own 23 behalf. He doesn't contact Bob Zapfel like Gordon 24 Crawford did. Instead he starts responding to 25 inquiries from outside recruiters.</p>

<p style="text-align: right;">Page 1702</p> <p>1 And when you have a chance, in the jury 2 room, take a look at the exhibits, our Defense 3 Exhibits 91 and 94. In February 2007 -- or 2008, I'm 4 sorry -- he starts talking to outside recruiters. All 5 right, so maybe he'll leave. And he's cashing out 6 hundreds of thousands of dollars in options and 7 putting them in the bank.</p> <p>8 Ms. Collins-Smee meets with him on May 9 20th, 2008, and says listen, there's a separation 10 package being put together for you, and if you don't 11 find a job by the end of June, I think we'll have to 12 call it quits. IBM can't keep you on the bench 13 forever. And on that same day, that same day, he 14 renews his contact with the outside recruiters. And 15 these are our Exhibits 110 and 111.</p> <p>16 And that's where all of this stands until 17 we give him a package. And the package contains 18 advice to consult with counsel. He consults with 19 counsel. And two days later he files an age 20 discrimination complaint.</p> <p>21 Now, is that the true story? I don't 22 know. Only Jim Castelluccio knows whether that's the 23 true story, and he hasn't been telling us the truth. 24 But I do know one thing, and that is, none of this had 25 anything to do with age discrimination.</p>	<p style="text-align: right;">Page 1704</p> <p>1 more than anything to keep his job at IBM. This 2 suggestion that because he happened to sell some stock 3 for which there could have been a hundred reasons and 4 that somehow is indicative his intention to bail on 5 IBM just makes no sense. And it's completely 6 inconsistent with everything that you've seen. Enough 7 about that.</p> <p>8 There's one thing that was said that I 9 just have to absolutely respond to. IBM just took the 10 position that Ms. Collins-Smee did exactly the same 11 thing that Mr. Kelton Jones had done. Think about 12 that. What Mr. Jones told you he planned to do was to 13 find another position for Mr. Castelluccio and move 14 him into the same position at the same time as he 15 found somebody else to take the vice president of 16 public sector position. That's hardly what Ms. 17 Collins-Smee did. She just pulled him out of the 18 position and never thought about what other job he 19 would have.</p> <p>20 And I do think it's indicative of age 21 discrimination. She didn't do that with anybody 22 younger. Look at all the younger people she found 23 jobs for. So the notion that she did the same thing 24 to Kelton Jones, it's hard to even hear that and not 25 respond</p>
<p style="text-align: right;">Page 1703</p> <p>1 Thank you for your attention throughout 2 that too long statement, and for your attention 3 throughout the case</p> <p>4 THE COURT: Thank you, Mr. Fasman.</p> <p>5 MR. CARTA: You have been extraordinarily 6 patient and I'll not ask you to sit there too much 7 longer.</p> <p>8 Let me just talk about -- for a second 9 about the stock options. I mean I have to tell you, 10 I'm quite surprised. Anybody who owns stock, there's 11 a million reasons for selling stock, and to say that 12 somehow a personal decision, a financial decision 13 that's made about when you sell stock, that that's 14 somehow indicative of Mr. Castelluccio wanting to bail 15 out of IBM, just makes no sense. You sell stock 16 because you have kids go to college and you need to 17 pay for it.</p> <p>18 Frankly, if you look at the chart, I wish 19 I had been that smart. He sold at the top of the 20 market. Right after that the market crashed. That 21 alone was a superb justification for selling those 22 stocks when he did.</p> <p>23 I truly don't believe that you're going 24 to be convinced for a second that Mr. Castelluccio 25 wasn't in there working his hardest and didn't want</p>	<p style="text-align: right;">Page 1705</p> <p>1 Let me talk for a moment about the 2 damages, because in the end I think that is going to 3 be a part of what you're going to need to wrestle 4 with.</p> <p>5 Professor Crakes explained his 6 calculation to you. I think he had some very 7 conservative reasonable assumptions, that he didn't 8 even build in any projections for increasing salary 9 with respect to the bonuses. He went back four years 10 and averaged the past four years and then projected 11 that number out over the rest of the period. He 12 didn't even add any increases.</p> <p>13 And he did that because we wanted to have 14 a reasonable, justifiable, conservative number. 15 \$1.345 million is a lot of money. Mr. Castelluccio 16 was a successful executive. On an annual basis he was 17 making \$288,000 a year, and he was out of work that 18 times when he wanted to work for the better part of 19 five years.</p> <p>20 Now, there's been some discussion about 21 when Mr. Castelluccio intended to retire. My 22 recollection is -- of his testimony is he said he 23 wanted to work through the end of his 65th year, so he 24 would have retired at the end of when he was 65, which 25 is when he became 66, and that's the number that Dr.</p>

<p style="text-align: right;">Page 1706</p> <p>1 Crakes used in this calculation, which is 4.67 years.  2 And I don't think there's any contrary testimony  3 The other criticism that I heard with  4 respect to Dr. Crakes is that his calculation didn't  5 take into account any wages that were earned by Mr.  6 Castelluccio when he was out of a job. Well, yeah, he  7 was out of a job. There weren't any wages for him to  8 earn.  9 It's true that in the beginning at the  10 time of his deposition Dr. Crakes did a calculation  11 that was assumed, because he didn't know, assumed that  12 Mr. Castelluccio was not going to get a job, but it  13 turned out that that was exactly the correct  14 assumption.  15 So Dr. Crakes's calculation was accurate,  16 and in fact when he testified he said he based it not  17 on what he had been told by an associate that he  18 worked with years ago, but it was based upon the  19 facts, that there was no earnings that had taken place  20 that should be used to offset the claim. He'd been  21 without a job, so there was nothing to subtract from  22 the wages that he would have earned.  23 And I just think that's -- couldn't be  24 more clear, and I think if you think about Dr.  25 Crakes's testimony, it was pretty clear that he was</p>	<p style="text-align: right;">Page 1708</p> <p>1 is. He does that in the jury charge. That's what's  2 going to happen next. Thank you.  3 THE COURT: All right, ladies and  4 gentlemen, I've made a command decision up here while  5 I was listening to the arguments of able counsel in  6 this case. In my jury charge I have to talk to you  7 about the law, and I've got to explain some nuances  8 and intricate things to you, and it would probably  9 result in my talking to you or actually reading to you  10 for maybe 45 minutes.  11 Now, it's quarter to 5, and the law in  12 this area is detailed and it's complex. The issues  13 that you have to consider are detailed and complex. I  14 want you to listen to me with a clear mind free of the  15 fatigue that you suffered all day waiting for us and  16 coming back and forth, so I'm not going to give you  17 the jury charge at quarter to 5 and finish at 5:30 and  18 then have you go into the jury room. There's no need  19 for that.  20 We're coming back tomorrow, and we're  21 going to be meeting here at 10 o'clock. The lawyers  22 are going to be here before because they've got some  23 work to do looking over the exhibits that'll be going  24 into you in the jury room. The lawyers will do their  25 work, and at 10 o'clock I'll be here, and we'll be in</p>
<p style="text-align: right;">Page 1707</p> <p>1 relying on what actually happened, which was the fact  2 that there weren't any wages that had been earned, and  3 therefore there was nothing to deduct.  4 You've heard testimony as well about Mr.  5 Castelluccio's emotional distress. Mr. Castelluccio  6 tried to describe to you the effects that he suffered  7 as a result of being discriminated against and losing  8 his job. You could see as he testified that even now,  9 five and a half years later, he's still feeling the  10 stress, the humiliation and the anxiety that comes  11 from having your 40-year career end. I won't say  12 anything more about that. You do what you think is  13 right with respect to emotional distress.  14 IBM has just raised the issue of  15 willfulness. The Judge will explain to you what that  16 term means, and he'll define it for you. I just heard  17 an awful lot from Mr. Fasman, who is an  18 extraordinarily able New York trial lawyer, but he was  19 telling you what the law is. That is not -- first of  20 all, at least four of the things he said to you I  21 think were just wrong. But that's not his job. It's  22 the Judge's job to tell you what the law is. And what  23 Mr. Fasman told you is the law is not only wrong, but  24 it's outside the scope of what his authority is.  25 Again, it's the Judge's job to tell you what the law</p>	<p style="text-align: right;">Page 1709</p> <p>1 all fresh and invigorated and ready to go. Drink some  2 V8 Juice or, you know, could have had a V8, come in,  3 and listen to the charge, and at this point you will  4 have the difficult task of applying the law to the  5 facts that you find. You are the judges of the facts.  6 But you've been assisted in this case by the services  7 of two very, very, very good lawyers.  8 So ladies and gentlemen, with that,  9 goodnight. Do not begin deliberating. It's  10 absolutely bitter outside. Go home and bundle up, sit  11 by the fireplace, get a good night's rest, and we'll  12 begin tomorrow, and hopefully finish tomorrow with a  13 verdict.  14 (Jurors excused)  15 THE COURT: Okay. I've explained what  16 we're going to do. And I'll see you here at 10  17 o'clock. If you have anything to talk to my law clerk  18 about, or I'll be up any chambers before then, but you  19 got to go over the exhibits, make sure they're all in  20 order. Nothing should go into the jury unless you are  21 in agreement that it should go. I think that's  22 basically it, all you have to do. I think we should  23 be able to begin at 10.  24 I would hope that the jury would be able  25 to plow through it. They are a serious,</p>

Page 1710

1 conscientious, able bunch of people, and I think  
2 they're -- you have engaged them, and you've captured  
3 their attention, and I look forward to see tomorrow,  
4 but for now, goodnight.

5 (Court adjourned)  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Page 1711

1 CERTIFICATE OF REPORTER  
2

3 I Hereby certify that the foregoing 205 pages  
4 are a complete and accurate computer-aided  
5 transcription of my original stenotype notes taken in  
6 the Matter of James Castelluccio VS International  
7 Business Machines Corporation, which was held before  
8 The Honorable Thomas P. Smith, U.S.M.J., at U.S.  
9 District Court, 450 Main Street, Hartford,  
10 Connecticut, on January 23, 2014.  
11  
12

13 Wendy Allen, RMR, CRR  
14 Notary Public  
15  
16

17 My commission expires: April 15, 2015  
18  
19  
20  
21  
22  
23  
24  
25

<p style="text-align: right;">Page 1711</p> <p style="text-align: center;">UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT</p> <p>JAMES CASTELLUCCIO ) Plaintiff ) 3:09-cv-01145 (TPS) ) VS ) January 24, 2014 INTERNATIONAL BUSINESS ) MACHINES CORPORATION ) Federal Building Defendant ) Hartford, Connecticut</p> <p style="text-align: center;">VOLUME 9 TRIAL HELD BEFORE THE HONORABLE THOMAS P. SMITH, U.S.M.J.</p> <p>Reporter: WENDY J. ALLEN, RPR, CRR, LSR #00221</p>	<p style="text-align: right;">Page 1713</p> <p>1 THE COURT: I think we've got to deliver 2 the charge to the jury, and all of the changes that we 3 discussed in our charging conference have been 4 incorporated in this, and what I propose to do is 5 maybe sit in the jury box, which is closer -- not the 6 jury box -- in the witness stand, which is closer to 7 the jury box, and read. Somehow when I'm in Judge 8 Covello's courtroom I prefer to do that. It's better 9 than doing it over here.</p> <p>10 But the charge is 17 pages long, and a 11 lot of it is repetitious of what I gave in the 12 preliminary charge. And it was just called to my 13 attention that I hadn't handed out to you the 14 preliminary charge, so that you would see it before I 15 gave it, but this is longer than it needs to be 16 because it's duplicative of some things I said in the 17 preliminary charge. But so be it, I guess.</p> <p>18 You ready to get the jury?</p> <p>19 MR. CARTA: Yes, Your Honor.</p> <p>20 MR. FASMAN: Yes, Your Honor.</p> <p>21 THE COURT: Okay. Madam clerk.</p> <p>22 (Jurors present)</p> <p>23 THE COURT: Good morning, ladies and 24 gentlemen.</p> <p>25 THE JURORS: Good morning.</p>
<p style="text-align: right;">Page 1712</p> <p>1 2 Representing the Plaintiff 3 Carta McAlister &amp; Moore, P.C. 4 1120 Boston Post Road 5 Post Office Boxer 83 6 Darien, CT 06820 7 By: Mark R. Carta, Esq. 8 mark@cmm-law.com 9 By: Margaret A. Triolo, Esq. 10 margaret@cmm-law.com 11 By: Troy Bailey, Esq.</p> <p>12 Representing the Defendant</p> <p>13 Paul Hastings, LLP 14 75 East 55th Street 15 New York, NY 10022 16 By: Zachary Fasman, Esq. 17 Zacharyfasman@paulhastings.com 18 By: Todd C. Duffield, Esq. 19 Toddduffield@paulhastings.com 20 By: Jean-Marie Gutierrez</p> <p>21 ALSO PRESENT:</p> <p>22 Daniel Fox, Esq. 23 IBM in-house counsel 24 25</p>	<p style="text-align: right;">Page 1714</p> <p>1 THE COURT: Please be seated.</p> <p>2 Now I'm going to be giving you the law 3 that you have to apply to the facts which you find in 4 this case, and it involves a lot of reading, and so 5 you're going to have to listen carefully. When I 6 finish, you'll have a copy of these jury instructions 7 with you in the jury room. So let me begin.</p> <p>8 There's something strange about having to 9 take off glasses to read. Especially when they're 10 trifocals.</p> <p>11 It's now up to me to give you the rules 12 of law that lie at the foundation of the various 13 matters here in issue: The rules which, when applied 14 by you, will lead to your ultimate decision.</p> <p>15 It's your duty to deliberate on this 16 case, and to arrive at a fair and just decision based 17 upon the evidence and the law. Sympathy has no place 18 in the case, and you should conscientiously and 19 definitely avoid any considerations of sympathy as a 20 basis for your decisions. This applies equally to the 21 plaintiff and to the defendant.</p> <p>22 You must apply the law, as I give it to 23 you, to the facts you find to have been proved. You 24 are to consider my jury charge as a whole and apply 25 the law that I give to you even if you believe the law</p>



<p style="text-align: right;">Page 1715</p> <p>1 should be different. You will then render your 2 verdict by a unanimous vote.</p> <p>3 When you go into the jury room to 4 deliberate, if you have a question, it must be set out 5 in writing and delivered to the court security 6 officers or marshals who would be here and they'll 7 transmit it to me, and we will then discuss it among 8 us and get back to you, either in writing or by 9 calling you back in here.</p> <p>10 Now, as I discussed in my preliminary 11 instruction, you're going to decide what the facts are 12 from the evidence that was presented here in court. 13 The evidence consists of the sworn testimony of 14 witnesses and exhibits that have been received into 15 the trial record, and any facts to which the lawyers 16 have agreed or stipulated or which I instruct you to 17 accept.</p> <p>18 Certain things are not in evidence and 19 are to be disregarded in deciding the facts of this 20 case. First, the statements and arguments of the 21 lawyers are not evidence.</p> <p>22 Second, the questions to the witnesses 23 are not evidence. They may be considered only to give 24 meaning to the witnesses' answers.</p> <p>25 Third, objections to questions and</p>	<p style="text-align: right;">Page 1717</p> <p>1 witness testified that people were coming back into 2 the courtroom after lunch with dripping umbrellas, you 3 may -- you would have circumstantial evidence from 4 which you may infer or conclude that it is raining 5 outside.</p> <p>6 Now, you may consider direct and 7 circumstantial evidence in deciding the case. The law 8 permits you to give equal weight to both, and so I 9 instruct you that circumstantial evidence may be just 10 as good and strong as direct evidence.</p> <p>11 Sometimes I may order that evidence be 12 stricken or the answers be disregarded, and this means 13 you, in deciding the case, may not consider the 14 evidence that I've told you to disregard. Also, 15 evidence is sometimes admitted for a limited purpose. 16 When I said that evidence has been admitted for a 17 limited purpose, you may consider that evidence only 18 for that limited purpose and for no other.</p> <p>19 The weight of testimony. There's no 20 magical formula by which one goes about evaluating 21 testimony. Instead, you should bring with you into 22 this courtroom all of the experience and background of 23 your daily lives. In your everyday affairs you 24 regularly determine for yourselves the reliability or 25 unreliability of statements that are made to you, or</p>
<p style="text-align: right;">Page 1716</p> <p>1 arguments are not evidence. Attorneys have a duty to 2 object when they believe a question is improper under 3 the rules of evidence. So you should not be 4 influenced by the objection or my ruling on it. If 5 the objection is sustained, you should ignore the 6 question. If the objection was overruled, you should 7 treat the answer to the question like any other 8 answer.</p> <p>9 Fourth, testimony that's been excluded, 10 stricken, or you have been instructed to disregard is 11 not evidence, and must be disregarded.</p> <p>12 Finally, anything you may have seen or 13 heard outside of the courtroom is not evidence. You 14 are to decide the case solely on the evidence offered 15 and received in the trial.</p> <p>16 Direct and circumstantial evidence. 17 There are two kinds of evidence. Direct and 18 circumstantial evidence. Direct evidence is testimony 19 by a witness about what that witness personally saw or 20 heard or did. Circumstantial evidence, on the other 21 hand, is indirect evidence of one or more facts from 22 which you may infer another fact.</p> <p>23 If, for example, a witness testifies that 24 it was raining outside, that would be direct evidence 25 that it was raining. On the other hand, if the</p>	<p style="text-align: right;">Page 1718</p> <p>1 documents that are given to you by others. The same 2 tests that you use in your everyday dealings are the 3 tests that you should apply in your deliberations 4 here.</p> <p>5 In applying these tests you should 6 consider the demeanor of the witness on the stand, or 7 any interest that he or she may have in the outcome of 8 the case. You may also consider any bias or prejudice 9 for or against any party, the witness's opportunity to 10 observe, any reason for the witness to remember or 11 forget, the inherent probability of his or her story, 12 its consistency or lack of consistency, and its 13 corroboration or lack of corroboration by other 14 credible evidence.</p> <p>15 Now, you may decide not to accept a 16 witness's testimony even if it stands uncontradicted 17 and unimpeached. On the other hand, you may find a 18 particular fact established even though it is 19 supported only by the testimony of one witness.</p> <p>20 In sum, ladies and gentlemen, you alone 21 determine what weight, if any, to give to the evidence 22 presented. You should carefully scrutinize all of the 23 testimony that's been given, the circumstances under 24 which each witness has testified, and every matter in 25 evidence which tends to indicate whether a witness is</p>

<p style="text-align: right;">Page 1719</p> <p>1 worthy of belief. You also should consider each  2 witness's intelligence, motive, state of mind, and  3 demeanor while on the stand. Consider also any  4 relation each witness may have to either side of the  5 case, the manner in which each witness might be  6 affected by the verdict, and the extent to which, if  7 at all, each witness is either supported or  8 contradicted by other credible evidence in the case.</p> <p>9 If you should find that any witness has  10 deliberately testified falsely on any matter, you may  11 take that into consideration in determining whether  12 that witness has testified falsely on other points.</p> <p>13 Now, simply because you find that a  14 witness has not testified accurately as to one fact,  15 it does not necessarily follow that the witness is  16 wrong on every other point. A witness may honestly be  17 mistaken on one point, part of his or her testimony,  18 yet entirely accurate on others. But if you find that  19 a witness has deliberately lied on a material point,  20 it's only natural that you should be suspicious of the  21 testimony of that witness on all points. Under these  22 circumstances you are entitled, if you deem it  23 appropriate, to disbelieve the entire testimony of  24 that witness, or to believe it in whole or in part.  25 Whether you disbelieve it or not lies in your sound</p>	<p style="text-align: right;">Page 1721</p> <p>1 To prove by a preponderance of evidence  2 means to prove that something is more likely so than  3 not. In other words, a preponderance of evidence  4 means such evidence as when considered and compared  5 with that opposed to it has a more convincing force  6 and produces in your minds a belief that what is  7 sought to be proved is more likely true than not true.</p> <p>8 Now, this is not necessarily determined  9 by the greater number of witnesses produced by a  10 party, but it means that the evidence on behalf of the  11 party on whom the burden rests must have a greater  12 qualitative force in your judgment. A greater  13 qualitative weight. That is, greater probative value.</p> <p>14 It might help you to visualize a pair of  15 scales in equal balance. Imagine that you can put the  16 plaintiff's evidence on one side of the scale, and the  17 defendant's evidence on the other side of the scale.</p> <p>18 Now, if the scales tip ever so slightly  19 in favor of the plaintiff, that means the evidence  20 preponderates in the plaintiff's favor and the  21 plaintiff has proved its case by a preponderance of  22 evidence. So if the scales tip ever so slightly in  23 the plaintiff's favor, then the plaintiff has proved  24 his case by a preponderance of evidence, and you  25 should find for him.</p>
<p style="text-align: right;">Page 1720</p> <p>1 judgment.</p> <p>2 I want to before we leave this  3 credibility area stress that the instructions I've  4 given apply generally to all witnesses equally. Any  5 witness who takes the witness stand subjects his or  6 her testimony to the tests that I've told you about.  7 This includes expert witnesses.</p> <p>8 As I explained in my preliminary  9 instructions, you are not required to accept the  10 opinion of any expert witness. As with any other  11 witness, it's up to you to decide whether to rely on  12 an expert's opinion. In deciding whether to accept or  13 rely on the opinion of an expert witness you may  14 consider any bias of the witness, as well as the data,  15 the methodology and the reasons used to support his or  16 her conclusions.</p> <p>17 As I told you in my preliminary  18 instructions, in a civil action the plaintiff bears  19 the burden of proof on each essential element of each  20 claim by a preponderance of evidence. Again, I want  21 to point out that the burden of proof in a civil case  22 differs from the burden of proof in a criminal case.  23 In a criminal case the burden of proof is proof beyond  24 a reasonable doubt. In a civil case the burden of  25 proof is proof by a preponderance of evidence.</p>	<p style="text-align: right;">Page 1722</p> <p>1 On the other hand, if the scales tip ever  2 so slightly in defendant's favor, then you will find  3 that the evidence preponderates in the defendant's  4 favor, and the plaintiff has not proved its case by a  5 preponderance of evidence. Rather, the plaintiff has  6 not sustained his burden.</p> <p>7 Now, I'm going to instruct you on the  8 substantive legal issues involved in this case.  9 Specifically I'm going to talk about the Age  10 Discrimination and Employment Act, known as the ADEA.  11 That's an acronym, A-D-E-A.</p> <p>12 And New York State Human Rights Law. The  13 New York State Human Rights Law is the state law claim  14 that the plaintiff has brought along with his age  15 discrimination -- his federal age discrimination  16 claim.</p> <p>17 The plaintiff has brought a claim  18 alleging that the defendant discriminated against him  19 on the basis of his age in violation of federal and  20 state law. The federal law at issue is the Age  21 Discrimination and Employment Act, or the ADEA for  22 short. The state law at issue is the New York State  23 Human Rights Law.</p> <p>24 Because the law governing the ADEA is  25 nearly identical to that governing New York state law,</p>

<p style="text-align: right;">Page 1723</p> <p>1 I'm only going to instruct you on the ADEA. The only 2 difference between the two laws relates to the type of 3 damages you may award if you find for the plaintiff, 4 and I will explain the law of damages a little later 5 on. 6 If you find the plaintiff has proven his 7 age discrimination claim under the ADEA, you must also 8 find that he has proved his claim under New York state 9 law. 10 The ADEA makes it unlawful for an 11 employer to discriminate against an employee who is 40 12 years of age or older because of that employee's age. 13 The ADEA does not require an employer to give special 14 or favorable treatment to employees who are 40 or 15 older. Rather, under the ADEA, the age of an employee 16 is to have a neutral status. Thus the mere fact that 17 plaintiff is over 40 years of age and worked for the 18 defendant for many years does not mean that the 19 defendant had to retain him as an employee or offer 20 him any position within its organization. 21 The purpose of the ADEA is to prevent 22 employment discrimination based on age. Simply 23 because an employer has taken unfavorable action 24 toward an employee who is 40 years of age or older 25 does not mean that an act of age discrimination has</p>	<p style="text-align: right;">Page 1725</p> <p>1 age, then your verdict must be for the defendant. 2 While the law prohibits discrimination, 3 it is not unlawful for an employer to take adverse 4 employment action when its actions are based on 5 non-discriminatory factors, whether you agree with 6 those factors or not. That is, you should not, and 7 you may not second-guess the wisdom or the 8 reasonableness of an employer's legitimate business 9 judgments, regardless of what opinion you may have 10 regarding these judgments. Permissible business 11 judgments include good faith errors, unwise business 12 decisions, unnecessary personnel moves, as long as 13 they're not a pretext for age discrimination 14 Again, I remind you that the plaintiff 15 has the burden to prove by a preponderance of evidence 16 that age rather than a permissible business decision 17 was the but-for cause of his termination. An inquiry 18 about retirement is not necessarily evidence of age 19 discrimination. 20 Now, when rendering your decision I would 21 like you also to keep in mind some additional 22 instructions which the parties have asked me to 23 include. Over the past several days you heard 24 testimony about Mr. Castelluccio's removal as vice 25 president of the public sector for IT delivery in</p>
<p style="text-align: right;">Page 1724</p> <p>1 taken place. Under the ADEA an employer may transfer, 2 terminate or take other actions against an employee 3 for any reason, good or bad, fair or unfair, as long 4 as it does not discriminate against the employee based 5 on age. 6 In order for the plaintiff to succeed on 7 his ADEA claim he must prove by a preponderance of 8 evidence that the defendant terminated his employment 9 because of his age. In other words, he must prove 10 that age was a but-for cause of his termination, 11 rather than just a contributing a factor or a 12 motivating factor. 13 The plaintiff must prove by a 14 preponderance of evidence that the defendant would not 15 have terminated him had he been younger and everything 16 else had remained the same. The plaintiff must prove 17 this through direct or circumstantial evidence. The 18 plaintiff's subjective belief alone is not sufficient 19 to prove discrimination. Discrimination is rarely 20 admitted and may be inferred from the existence of 21 other facts. 22 If the plaintiff meets his burden, your 23 verdict must be for the plaintiff. If the plaintiff 24 does not prove by a preponderance of the evidence that 25 the defendant terminated his employment because of his</p>	<p style="text-align: right;">Page 1726</p> <p>1 February 2007, and his later removal as senior 2 delivery project or DPE of the WellPoint account in 3 November of 2007. 4 These removals are not the basis of Mr. 5 Castelluccio's discrimination claims and the legality 6 of Mr. Castelluccio's removal from these two positions 7 is not before you. The only issue before you is the 8 legality of Mr. Castelluccio's termination on June 9 30th, 2008. 10 The evidence you have heard and seen with 11 respect to Mr. Castelluccio's removal from the two 12 positions in 2007 is background information, which you 13 may consider, but you need not consider. Rather, the 14 evidence with respect to those removals has been ruled 15 by the Court to be simply background evidence. 16 The legality of those two actions is not 17 something that's before you now. Rather, that 18 evidence, as I said, of the removal is background 19 information which you may consider, but you need not 20 consider in determining whether Mr. Castelluccio was 21 terminated because of his age on June 30th, 2008. The 22 weight, if any, you give to this evidence is up to 23 you. 24 You've also heard that there were at 25 least 106 Band C and Band D executive job openings in</p>

Page 1727	Page 1729
<p>1 certain minute drill meetings during the period of  2 January 1st, 2008, through June 30th, 2008. Of those  3 106 openings, 16 of them were posted and filled in  4 Joanne Collins-Smee's organization. The remaining  5 positions were in other areas of IBM's business.  6 Joanne Collins-Smee could have requested  7 that Mr. Castelluccio be considered for those  8 positions. However, the decisions about whom to place  9 in these positions were made by executives other than  10 Joanne Collins-Smee.  11 Mr. Castelluccio offers this evidence to  12 show the number of positions that were open during the  13 period between January 1st, 2008, until June 30th,  14 2008. Mr. Castelluccio asserts that Ms. Collins-Smee  15 should have disclosed these positions to him, given  16 him an opportunity to apply for them, and in some  17 cases recommended him for these positions.  18 Mr. Castelluccio does not claim that he  19 should have been hired for these positions, and you  20 should not treat IBM's selection of someone other than  21 Mr. Castelluccio for any of these open positions as  22 evidence of age discrimination.  23 In addition, Mr. Castelluccio claims that  24 IBM has offered two different reasons for his  25 termination; poor performance, and his inability to</p>	<p>1 proving both that he was damaged and the extent of  2 those damages.  3 Before I talk to you more about damages,  4 I want to give you a few words of caution. The fact  5 that I'm instructing you on the subject of damages  6 does not mean that I have an opinion one way or  7 another on whether you should or you should not reach  8 the issue of damages in your deliberations. In  9 addition, you must not construe IBM's presentation of  10 evidence on the issue of damages to be an admission  11 that it's liable to Mr. Castelluccio for damages or  12 that Mr. Castelluccio is entitled to damages. IBM was  13 required to address the issue of damages or it would  14 have lost the opportunity to do.  15 So I will now instruct you on the damages  16 issue in this case.  17 First, we have compensatory damages. The  18 federal law, the ADEA, says that a plaintiff may  19 recover money damages for lost wages and benefits,  20 including increases in wages. The purpose of money  21 damages is to compensate the victim of wrongful  22 discrimination by putting the victim in the same  23 position he would have been in if the wrongful  24 discrimination had not occurred.  25 The law places the burden on the</p>
Page 1728	Page 1730
<p>1 locate a job after being placed on the bench. When an  2 employer offers different reasons for the same actions  3 a jury is entitled to infer that neither reason is  4 accurate and that the true reason is discrimination.  5 This is not true, however, where there  6 are two reasons that are both factually true and where  7 the two reasons are related. When this is the case,  8 both reasons may be accurate, and reliance on both  9 reasons is not evidence of a discriminatory motive.  10 If you find that this is the case, you should not  11 infer discriminatory intent simply because the  12 employer has come forward with two related reasons for  13 the action.  14 Finally, you heard testimony about IBM  15 performing an internal investigation called an open  16 door investigation with respect to Mr. Castelluccio's  17 allegations of age discrimination. You may consider  18 this testimony as evidence that IBM takes such  19 allegations seriously. You should not consider it for  20 any other purpose.  21 Damages. If you find that Mr.  22 Castelluccio was discharged due to age discrimination,  23 you must go on to determine the amount of money to be  24 awarded. And this is the law of damages. You should  25 bear in mind that the plaintiff has the burden of</p>	<p>1 plaintiff to prove facts that will enable you to  2 arrive at this amount with reasonable certainty.  3 While it's not necessary for the plaintiff to prove  4 the amount of damages with mathematical precision, the  5 plaintiff must present evidence such as might  6 reasonably be expected to be available in the  7 circumstances.  8 If you find for the plaintiff on his  9 claim of age discrimination, you should award him  10 damages in the amount of the salary and benefits he  11 would have earned had he not been terminated from the  12 date of termination until the date that you find he  13 would have retired. This includes the plaintiff's  14 base salary plus any pay raises, profit sharing,  15 bonuses, 401 contributions, and benefits he would have  16 received had he continued his employment.  17 You should deduct from this sum any  18 amount that the plaintiff has received since he was  19 employed by IBM. These deductions include pension  20 benefits he has received from IBM from the time of his  21 termination until the date you find he would have  22 retired, and any wages he has obtained from other  23 employment.  24 You must also deduct amounts which could  25 have been earned by the plaintiff through the exercise</p>



<p style="text-align: right;">Page 1731</p> <p>1 of reasonable diligence. This is known as the duty to  2 mitigate damages. In this regard it's the plaintiff's  3 duty under the law to use all reasonable diligence to  4 obtain employment or seek other sources of income to  5 minimize or avoid any damages he might suffer. This  6 includes the obligation to seek and accept other  7 suitable employment which might have been available  8 using reasonable efforts -- might have been available  9 to him using reasonable efforts. A plaintiff need not  10 accept employment that is not reasonably comparable to  11 his previous position. Unlike other aspects of the  12 case, here it's defendant's burden to prove by a  13 preponderance of the evidence that the plaintiff  14 failed to mitigate</p> <p>15 Now, I want to talk to you about  16 something -- up to this point I've talked to you about  17 compensatory damages, that is, damages designed to  18 compensate and to make the plaintiff whole. Now I'm  19 talking to you about another kind of damages called  20 liquidated damages.</p> <p>21 The ADEA also provides that if a  22 defendant's violation is willful, then the plaintiff  23 may also be awarded additional damages known as  24 liquidated damages. This is an amount equal to the  25 lost wages and benefits you award the plaintiff. In</p>	<p style="text-align: right;">Page 1733</p> <p>1 If you find that the defendant terminated  2 the plaintiff's employment reasonably and in good  3 faith, even though it turns out that the termination  4 violated the ADEA, then the violation was not willful.  5 If you find that the defendant knew it was violating  6 the ADEA, or acted with reckless disregard of whether  7 it was violating the ADEA, then the violation is  8 willful.</p> <p>9 Now I want to talk to you about yet  10 another type of damages. Damages under the New York  11 State Human Rights law, and specifically I want to  12 talk to you about emotional distress.</p> <p>13 Under the New York State Human Rights  14 law, if you conclude that the defendant terminated the  15 plaintiff's employment because of his age, then he is  16 also entitled to recover a different measure of  17 damages designed to compensate him for any pain,  18 suffering or mental anguish caused by the defendant's  19 conduct. The damages that you award must be fair  20 compensation, no more and no less.</p> <p>21 In order for the plaintiff to recover  22 damages for emotional distress, he must prove by a  23 preponderance of evidence that he incurred actual  24 physical or emotional distress as a result of the  25 defendant's unlawful conduct. Thus you must first</p>
<p style="text-align: right;">Page 1732</p> <p>1 essence, if you find that the defendant willfully  2 violated the ADEA, the plaintiff would be entitled to  3 double his lost wages and benefits. The purpose of  4 these liquidated damages is to punish an employer for  5 a violation of the ADEA that is willful.</p> <p>6 To establish a willful violation of the  7 ADEA, the plaintiff must prove that age was the  8 but-for cause of his termination. To show a willful  9 violation, the plaintiff must also prove by a  10 preponderance of evidence that when the defendant  11 terminated his employment, the defendant knew it was  12 violating the ADEA, or the defendant showed a reckless  13 disregard for the matter of whether it was violating  14 the ADEA.</p> <p>15 An act or a failure to act is done with  16 reckless disregard if it's done in such a way that it  17 pays no concern to its probable or possible injurious  18 consequences, or which, though foreseeing such  19 consequences, persists despite such knowledge. It's  20 not enough for the plaintiff to show that the  21 defendant knew that the ADEA existed and might apply  22 to its actions, or that it knew it was against the law  23 to discharge an employee because of his age. A  24 violation is not willful if it is done by accident,  25 inadvertence or ordinary negligence.</p>	<p style="text-align: right;">Page 1734</p> <p>1 determine whether the plaintiff actually suffered  2 emotional distress. You must then determine whether  3 the distress was caused by the defendant's conduct as  4 opposed to other events or factors in the plaintiff's  5 life.</p> <p>6 You may not presume that the plaintiff  7 suffered emotional harm simply because you found he  8 was a victim of discrimination. The law does not  9 allow you to compensate a plaintiff for the normal and  10 ordinary upset or upsetting experiences one has in the  11 workplace. Some discomfort and bad feelings are  12 inherent in the nature of work. Furthermore, you may  13 not award any amount as damages for emotional distress  14 which arose as a result of any stress the plaintiff  15 may have experienced in connection with the process of  16 litigating this action.</p> <p>17 In determining the amount of damages, if  18 any, for emotional distress, the law does not provide  19 a set formula. Any award that you make should be fair  20 in light of the evidence presented. No evidence of  21 the monetary value of such intangible things as pain  22 and suffering need be introduced into evidence.  23 Psychiatric or other medical evidence is not a  24 precondition to a recovery of emotional distress.  25 Mental and emotional distress may be proved by the</p>



<p style="text-align: right;">Page 1735</p> <p>1 plaintiff's own testimony corroborated by reference to  2 the circumstances of the alleged misconduct. Do not  3 decline to award emotional distress for the sole  4 reason that they are difficult to measure.</p> <p>5 In determining the amount of any damages  6 that you decide to award, if any, you should be guided  7 by common sense. You must use sound judgment in the  8 fixing of an award of damages, drawing reasonable  9 inferences from the facts in evidence. You may not  10 award damages based on sympathy, speculation or  11 guesswork. On the other hand, the law does not  12 require that the plaintiff prove the amount of his  13 losses with mathematical precision, but only with as  14 much definiteness and accuracy as the circumstances  15 permit.</p> <p>16 Now, you'll be given a copy of these  17 instructions when you are deliberating. They'll be  18 with you in the jury room, and we have also prepared  19 the verdict form to assist you in recording your  20 verdict and guiding your deliberations.</p> <p>21 You may now retire to the jury room, and  22 your first order of business should be to elect a  23 foreperson. Once we've sent the exhibits into the  24 jury room, you may begin your actual deliberations.  25 Now, if you find that it's necessary to</p>	<p style="text-align: right;">Page 1737</p> <p>1 MR. CARTA: How short of a leash do you  2 want us on, Your Honor? Can we go across the street  3 to get a sandwich, or do you want us in the building  4 the whole time?</p> <p>5 THE COURT: No, you can go get a  6 sandwich. Where would you be going, the New York Deli  7 right straight across?</p> <p>8 MR. CARTA: Either that or Max Bibo's.  9 Up to you, Your Honor.</p> <p>10 THE COURT: If we have a phone number,  11 cellphone number, you can go to Max Bibo's, and we'll  12 call you, get you back here.</p> <p>13 MR. CARTA: Okay.</p> <p>14 MR. FASMAN: All right, Your Honor.</p> <p>15 MR. CARTA: Thank you.</p> <p>16 MR. FASMAN: Thank you.</p> <p>17 THE COURT: You're welcome.</p> <p>18 Nice job, gentlemen.</p> <p>19 MR. FASMAN: Thank you, sir.</p> <p>20 (Recess taken from 11:03 a.m. to 1:26 p.m.)</p> <p>21 THE COURT: The clerk has advised me that  22 the jury has sent out a note, and I will read the note  23 to you and let you examine it, of course, but the note  24 asks, "What is the document that shows the reason IBM  25 terminated Castelluccio?"</p>
<p style="text-align: right;">Page 1736</p> <p>1 communicate with the Court, you should do so in  2 writing in a note signed by the foreperson and handed  3 to the court security officer who will be outside the  4 jury room. The court security officer will give it to  5 us and we will take care of whatever concern is  6 expressed in that note.</p> <p>7 I believe that's it.</p> <p>8 Gentlemen, anything else?</p> <p>9 MR. CARTA: No, Your Honor.</p> <p>10 MR. FASMAN: No, Your Honor.</p> <p>11 THE COURT: Okay. Well, ladies and  12 gentlemen, you may retire. Thank you.</p> <p>13 (Jurors excused)</p> <p>14 THE COURT: Have counsel looked over the  15 exhibits and believe they're in order and should be  16 submitted?</p> <p>17 MR. CARTA: Yes, we did it early this  18 morning, yes, Your Honor.</p> <p>19 MR. FASMAN: Yes, Your Honor.</p> <p>20 THE COURT: I don't think there's  21 anything else, then.</p> <p>22 MR. FASMAN: No, sir.</p> <p>23 THE COURT: If we get a question, I'll  24 just round everybody up. I imagine you'll be sitting  25 here. We'll answer the question as best we can.</p>	<p style="text-align: right;">Page 1738</p> <p>1 Let's talk about how to deal with this.</p> <p>2 MR. CARTA: There certainly is one  3 document that we put in for that express reason, which  4 is a redacted document in which IBM says that it was  5 for performance --</p> <p>6 (Juror opens jury room door)</p> <p>7 THE CLERK: They heard somebody knocking.</p> <p>8 MR. FASMAN: Your Honor, I think there  9 was one here.</p> <p>10 Your Honor, I believe it was Plaintiff's  11 204 that was reported that Mr. Carta produced that  12 shows the reason.</p> <p>13 MR. CARTA: That was one of the ones.  14 That was the one I just alluded to, correct. The  15 other one that we had was a demonstrative exhibit that  16 listed changes.</p> <p>17 MR. FASMAN: I think it's Plaintiff's  18 204, Your Honor.</p> <p>19 THE COURT: The note from the jury has  20 been examined by both counsel, and it's been marked as  21 Court's Exhibit 2, and counsel right now are going  22 over their documents, and we should have an answer  23 shortly to the question.</p> <p>24 MR. CARTA: Your Honor, I think we're in  25 agreement.</p>

<p style="text-align: right;">Page 1739</p> <p>1 MR. FASMAN: I think we're in agreement, 2 Your Honor. 3 THE COURT: Let's give a written answer 4 on a piece of paper, and I'll write it, and we'll mark 5 it as a Court exhibit and we'll send it in. 6 MR. FASMAN: There are actually two 7 documents. 8 THE COURT: What do you want me to write 9 down? 10 MR. CARTA: Plaintiff's Exhibit 92 and -- 11 MR. FASMAN: Plaintiff's Exhibit 204. 12 THE COURT: So I've got Plaintiff's 13 Exhibit 92 and 204. 14 MR. FASMAN: 204 it's pages 7 and 8. 15 MR. CARTA: 7 they 8. 16 THE COURT: With counsel's agreement, we 17 are answering the jury's question by sending them an 18 answer on a piece of paper, signed by me. Counsel are 19 in agreement that the answer should say, "Plaintiff's 20 Exhibits 92 and 204 at 7 through 8." 21 MR. CARTA: I agree with that, Your 22 Honor, that's correct. 23 MR. FASMAN: Yes, Your Honor. 24 THE COURT: Okay. This will be marked as 25 Court exhibit 2.</p>	<p style="text-align: right;">Page 1741</p> <p>1 by a preponderance of the evidence that IBM terminated 2 his employment because of his age? 3 Answer: Yes. 4 Question 2-A: What amount of back pay 5 and benefits, if any, has Mr. Castelluccio proven he 6 is entitled to by a preponderance of evidence? This 7 amount should be calculated through the date that you 8 find Mr. Castelluccio likely would have retired. 9 Amount: \$1,345,042, plus tax liability. 10 Question 2-B: What amount of retirement 11 pay and/or benefits has the plaintiff received that he 12 would not have received had he remained employed at 13 IBM? 14 Amount: \$345,150.36. 15 2-C: Subtracting the amount you have 16 written in 2-B from 2-A, what is your award of back 17 pay and benefits? 18 \$999,891.70, plus tax liability. 19 Question 3: Has IBM proven by a 20 preponderance of evidence that after Mr. Castelluccio 21 was terminated by IBM he had made no reasonable 22 efforts to seek employment? 23 Answer: No. 24 Question 4: Has IBM proven by a 25 preponderance of evidence that after Mr. Castelluccio</p>
<p style="text-align: right;">Page 1740</p> <p>1 (Recess taken from 1:26 p.m. to 2:28 p.m.) 2 THE COURT: The record should reflect 3 that the jury passed out another note which has been 4 marked as Exhibit 3. The note is a question, and it 5 says, "If needed, how do we calculate tax liability?" 6 And it's signed by the foreman. 7 Counsel and I have discussed this, and 8 counsel are in agreement that the note should be sent 9 back to the jury with the answer, "The Court makes the 10 calculation." 11 So that's what we're going to do. 12 (Recess taken from 2:29 p.m. to 2:59 p.m.) 13 THE COURT: The verdict form is on my 14 bench and I'm handing it now to the clerk who would 15 read the verdict. 16 (Jurors present) 17 THE COURT: Please be seated members of 18 the jury. We understand that you have reached a 19 verdict, and the verdict form has been given to the 20 clerk, who will now read the verdict. 21 Mr. Pylman. 22 THE LAW CLERK: This is the verdict form 23 in James Castelluccio versus International Business 24 Machines Corporation, civil number 3:09-cv-1145 TPS. 25 Question 1: Has Mr. Castelluccio proven</p>	<p style="text-align: right;">Page 1742</p> <p>1 was terminated by IBM suitable work existed for Mr. 2 Castelluccio? 3 Answer: Yes. 4 Question 5: What amount, if any, has IBM 5 proven by a preponderance of evidence should be 6 deducted from the amount of back pay and benefits owed 7 to Mr. Castelluccio as a result of his failure to use 8 reasonable efforts to seek employment? 9 Amount: Zero dollars. 10 Question 6: Has Mr. Castelluccio proven 11 by a preponderance of evidence that one, he suffered 12 emotional distress, and two, such distress was caused 13 by IBM's conduct? 14 Answer: Yes. 15 Question 7: What amount of damages, if 16 any, would fairly compensate Mr. Castelluccio for the 17 emotional distress he suffered as a result of IBM's 18 conduct? 19 Amount: \$500,000. 20 Question 8: Has Mr. Castelluccio proven 21 by a preponderance of evidence that IBM knew or showed 22 reckless disregard for whether its termination of Mr. 23 Castelluccio constituted age discrimination? 24 Answer: Yes. 25 Your Honor, the record should reflect</p>

<p style="text-align: right;">Page 1743</p> <p>1 that this verdict form has been signed by the  2 foreperson, and dated today, January 24th, 2014.  3 THE COURT: Thank you, sir.  4 Ladies and gentlemen, you've heard your  5 verdict read. Is that your verdict, so say you all?  6 THE JURORS: Yes.  7 MR. FASMAN: Your Honor, we would like to  8 pole the jury, please.  9 THE COURT: Okay.  10 Juror number 1. You heard the verdict  11 read. Is that your verdict?  12 JUROR #1: Yes.  13 THE COURT: Juror number 2. You have  14 heard the verdict read. Is that your verdict?  15 JUROR #2: Yes.  16 THE COURT: Juror number 3. You've heard  17 the verdict read. Is that your verdict?  18 JUROR #3: Yes.  19 THE COURT: Juror number 4. You've heard  20 the verdict read. Is that your verdict?  21 JUROR #4: Yes.  22 THE COURT: Juror number 5. You have  23 heard your verdict read. Is that your verdict?  24 JUROR #5: Yes.  25 THE COURT: Juror number 6. You've heard</p>	<p style="text-align: right;">Page 1745</p> <p>1 excuse you with the thanks of every person in this  2 room. I know that every person in this room does  3 thank you. And so if there's nothing further, you may  4 be excused.  5 (Jurors excused)  6 THE COURT: Mr. Fasman.  7 MR. FASMAN: Your Honor, we renew our  8 motion for directed verdict, and we'll be filing a  9 motion for entry of judgment notwithstanding the  10 verdict.  11 THE COURT: Okay. As I told you, when  12 you made the Rule 50 motion, that I would take the  13 motion under advisement. I read it, I read it  14 carefully, I read it thoroughly then, but in  15 accordance with the Second Circuit's preferred  16 practice, I held decision in reserve awaiting the  17 jury's determination. The jury's determination has  18 now made it a necessary that I address that motion in  19 detail, and that is what I intend to do.  20 Now, you are -- I think you are correct  21 in your procedure that you have to file a JNOV to  22 accompany -- I guess what I'm trying to say is I  23 believe the correct procedure would be for you to file  24 a JNOV and for me to address the Rule 50 motion and  25 the JNOV in one ruling. Frankly, I'm not sure how</p>
<p style="text-align: right;">Page 1744</p> <p>1 the verdict read. Is that your verdict?  2 JUROR #6: Yes.  3 THE COURT: Juror number 7. You have  4 heard the verdict read. Is that your verdict?  5 JUROR #7: Yes.  6 THE COURT: Juror number 8. You have  7 heard the verdict read. Is that your verdict?  8 JUROR #8: Yes.  9 THE COURT: So is your verdict, so say  10 you all?  11 THE JURORS: Yes.  12 THE COURT: Ladies and gentlemen, is  13 there anything further that we have to do?  14 MR. CARTA: Not today, Your Honor.  15 MR. FASMAN: Your Honor, we have some  16 motions, but I don't think we need to retain the jury  17 for that purpose.  18 THE COURT: Okay. Ladies and gentlemen,  19 thank you very much for your service in this case.  20 You worked very hard over these past two weeks, and  21 you were very attentive. This was a tough case, and  22 when you make tough decisions, inevitably you make  23 some people happy and you make others not happy, but  24 that's just part of the nature of things. I order  25 that your verdict be accepted and entered, and I now</p>	<p style="text-align: right;">Page 1746</p> <p>1 Rule 50 -- is it 52 for the JNOV?  2 MR. FASMAN: I believe it is, Your Honor.  3 THE COURT: I'm not sure how they  4 dovetail, but I will address both of those motions in  5 the normal course of business.  6 Mr. Carta?  7 MR. CARTA: I have nothing, Your Honor.  8 THE COURT: All right. Ladies and  9 gentlemen, this was a hard-fought battle, and I think  10 all of the lawyers in this courtroom distinguished  11 themselves in representation of their respective  12 clients. Unfortunately in our profession there's one  13 side that prevails and there's one side that doesn't  14 prevail. I wish I could send everybody away happy,  15 but I can't. But I do send you off letting you know  16 that I have fond memories of presiding in this case  17 over the past two weeks, mostly on account of the  18 civility and professionalism of the counsel in this  19 case.  20 So with that, I don't think there's  21 anything more that I can do, and therefore court is  22 adjourned.  23 (Court adjourned)  24  25</p>

Page 1747

1 CERTIFICATE OF REPORTER  
2

3 I Hereby certify that the foregoing 36 pages  
4 are a complete and accurate computer-aided  
5 transcription of my original stenotype notes taken in  
6 the Matter of James Castelluccio VS International  
7 Business Machines Corporation, which was held before  
8 The Honorable Thomas P. Smith, U.S.M.J., at U.S.  
9 District Court, 450 Main Street, Hartford,  
10 Connecticut, on January 24, 2014.

11  
12  
13 Wendy Allen, RMR, CRR  
14 Notary Public  
15

16  
17 My commission expires: April 15, 2015  
18  
19  
20  
21  
22  
23  
24  
25

A-720

## **The IBM Personal Business Commitments Program**

**Document number USHR105**

**February 17, 2004**

1

CONFIDENTIAL

**PLAINTIFF'S  
EXHIBIT 1**

**3:09-CV-1145 (TPS)**

IBM00092892



## Table of Contents

<b>1. IBM's Personal Business Commitments Philosophy</b>	3
<b>2. Introduction</b>	4
<b>3. The Annual PBC Cycle</b>	5
3.1 Step 1: Set Your Goals	5
3.1.1 <i>Goal Alignment</i>	5
3.2 Step 2: Document Results	6
3.3 Step 3: Ratings and Assessment	6
3.3.1 <i>About the Ratings</i>	7
3.3.2 <i>Ratings for People Managers</i>	7
3.3.3 <i>Unsatisfactory Rating</i>	7
3.3.4 <i>New Hires</i>	8
3.3.5 <i>Out-of-cycle Changes or Closeouts</i>	8
3.4 Feedback - Informal Guidance and Interim Review	8
<b>4. Goal-setting Guidelines</b>	10
4.1 Business Goals	10
4.2 Development Goals	10
4.3 People Management Goals	10
<b>5. Roles and Responsibilities</b>	12
<b>6. Contact Information</b>	13

## **1. IBM's Personal Business Commitments Philosophy**

IBM's success depends on how well each of us achieves our individual goals and contributes to the company's strategic objectives. The PBC program is the means by which all IBM employees worldwide set their goals for the year, receive feedback on their performance and development needs, and get evaluated on their performance.

At the start of each year, you are expected to set personal business goals that align directly with IBM's overall business goals and values. These goals should guide you throughout the year. At the end of the year your manager will evaluate how well you achieved your goals, compared to your peers, and give you a PBC rating to reflect your overall performance. This rating will be a key factor in determining your performance bonus, pay increase, and career opportunities.

The entire PBC framework is designed to reinforce IBM's high-performance culture and effectively differentiate employees based on their contribution to the company. To sustain marketplace leadership, IBM must maintain an environment where every employee is stimulated to perform at an exceptional level. The PBC program is the best way to recognize top contributors, motivate above average and solid contributors to perform at their peak, and identify low contributors who need to improve. Employees who make the biggest contribution to the company get the biggest rewards, and those who are the lowest contributors will know exactly where they stand.

## **2. Introduction**

This document describes the annual PBC process and the roles and responsibilities of the employee, the manager, and the reviewing manager in the process.

### **Disclaimer**

IBM reserves the right, at its discretion, to amend, change or terminate the Personal Business Commitments program as the company requires. Nothing in this brochure shall be construed as creating an express or implied obligation on the part of IBM to maintain such a program.

### **3. The Annual PBC Cycle**

There are three steps to the annual PBC cycle:

- Step 1: Set your goals
- Step 2: Document your results
- Step 3: Ratings and Assessment

#### **3.1 Step 1: Set Your Goals**

At the beginning of each year, all employees must set personal business goals and document them in the PBC application. In addition to setting business goals, employees also need to document one or two development objectives. Managers (of employees) also write an additional set of goals related to their management responsibilities.

##### **3.1.1 Goal Alignment**

###### **IBM Strategic Objectives and IBM Values**

###### **Business Unit Goals**

###### **Department Goals**

###### **Personal Business Goals**

At the start of each year, IBM's senior management team establishes the company's annual business objectives. Then, each successive level of management sets goals that support those above it. Your manager will communicate your department's goals for the year so you can tie directly into them. These steps can happen concurrently as long as alignment is achieved.

To be considered a top performer at IBM you must not only achieve results that contribute to IBM's success, but you must do so according to IBM's values. While IBM is a results-oriented company, we are also a company that puts a great deal of weight on our values: dedication to every client's success, innovation that matters - for our company and for the world; and trust and personal responsibility in all relationships.

When setting your goals, make sure they align with IBM's core values. At the end of the year, you will be evaluated not only on what you achieved during the past 12 months, but also on how you achieved it. If you failed to live up to IBM's values while pursuing your goals—no matter how great the results may be—it will be reflected in your PBC rating.

More about how to set goals can be found in the "Goal-setting Guidelines" section of this brochure.

### 3.2 Step 2: Document Results

It's important to keep an ongoing and accurate record of your results throughout the year so that you can incorporate them into your year-end results summary. Your manager will assess your results when giving you your PBC rating.

Documented results are factual statements about what you have achieved against your stated goals. Your documentation should address such matters as quality, quantity, costs/savings, meeting schedules or targets, and the impact your results have had on your team or department.

All employees need to document how they achieved their personal business goals as well as the impact their development goals had on achieving their business goals. People managers must also document their people management-related results, as well as the impact their development goals had on their people management goals.

Do not wait until the end of the year to put your results in writing. Make it a point to periodically update your records. In addition, take advantage of opportunities throughout the year to get informal feedback from your manager, team leader, colleagues, and customers to check whether you're on track in meeting your goals.

At the end of the year, record all your results in the PBC web application and send the form to your manager. Be sure to include all relevant information, including any performance feedback you received during the year.

### 3.3 Step 3: Ratings and Assessment

At the end of the year, your manager will evaluate your achievements and rate your performance for the calendar year. You will receive a single year-end rating that takes into account your full year performance, including any job changes or promotions. Your performance is evaluated not only on the results you achieved against your goals, but also in terms of your contribution to IBM's success relative to your peers (known as "relative contribution") and the compatibility of your behavior to IBM's values.

Your ability to show results can be greatly influenced by your acumen in IBM's foundational competencies, such as creative problem solving, teamwork and collaboration and other behaviors. While crucial to your success, however, you will not be rated specifically on your competencies or the related development goals you set early in the year. It's the end results and how you achieved them that count the most.

You must document your results in the PBC tool yourself and then you and your manager will review your achievements together. Your manager may modify the documentation or ask you to do so, where appropriate, for accuracy or clarity.

After considering all relevant information, your manager will give you a rating and provide a rationale for the rating. You will be asked to acknowledge reviewing the assessment and rating, and two levels of management will sign the final rating form.

It is important to remember that each year you will earn a new rating based on an overall assessment of your performance for that year. With each passing year, however, the expectations



for your performance will rise, which means you'll have to perform at a higher level to achieve the same rating as the year before.

### 3.3.1 About the Ratings

Your PBC rating is characterized in terms of your relative contribution to IBM's success for the year and reflects the degree to which you supported IBM's goals and lived the company's values.

Rating	Description	Definition
PBC 1	Among the top contributors this year	Achieves exceptional results; as a 1 performer, clearly stands out from the rest; is a role model for the IBM values.
PBC 2+	Above average contributor	Goes above and beyond job responsibilities; outperforms most peers; finds ways to grow scope and impact.
PBC 2	Solid contributor	Consistently meets job responsibilities; is reliable in doing job; demonstrates appropriate level of knowledge, skill, effectiveness and initiative.
PBC 3	Among the lowest contributors, need to improve	When compared to others: <ul style="list-style-type: none"> <li>Does not fully execute all job responsibilities, or executes responsibilities with a lower degree of results, and / or;</li> <li>Does not demonstrate as high a level of knowledge, skill, effectiveness or initiative.</li> </ul> Consecutive ratings at the PBC 3 level are unacceptable in IBM's high performance culture and require improvement.
PBC 4	Unsatisfactory	Does not demonstrate or utilize knowledge and skill required; Does not execute against job responsibilities; and / or Shows no significant improvement after consecutive ratings at the PBC 3 level.

### 3.3.2 Ratings for People Managers

IBM believes that people management is so vital to the company's success that if you are not excelling in your people management role, you cannot reasonably be performing at a top level overall. Managers can get a top overall PBC rating of 1 only if they are above average in performing their people management responsibilities

You are considered to have people management responsibilities if you are responsible for direct supervision of two or more individuals, including conducting their annual performance evaluation. This includes coaches within BCS.

### 3.3.3 Unsatisfactory Rating

Where, taking all relevant information into account, an employee's results were unsatisfactory, the manager initiates the review and specifies the areas where the employee's performance needs immediate and sustained improvement and sets a period of time within which improvement is required. An Unsatisfactory rating can be given at any time during the year. If the employee successfully completes the improvement period, the manager must assess with the appropriate

rating. Failure to adequately address the areas needing immediate and sustained improvement results in termination. Should the employee successfully complete the improvement period and his/her performance subsequently become unsatisfactory for the same or similar reasons, immediate termination could result.

#### **3.3.4 New Hires**

IBM wants to hire and retain employees who are able to meet and exceed performance objectives, demonstrate those skills that were expected when hired, continue to grow skills valued by IBM and the customer, and demonstrate behaviors that reflect their ability to function effectively and productively in the IBM environment. Nowhere is it more important to set this perspective than early in a person's employment with IBM. During the first two annual PBC assessment cycles, behaviors and skills demonstrated, in addition to the overall rating and assessment, are evaluated for all new hires. Failure to meet expectations with respect to behaviors or skills, even if an employee meets or exceeds his or her objectives will result in a rating of unsatisfactory.

Year-end PBCs are not required for new hires hired on or after October 1. These new hires will still be eligible for a performance bonus based on the ranges for a PBC rating of 2/2+. A PBC rating for these new hires can be given at management discretion if there has been sufficient time, opportunity and results upon which to base an assessment.

#### **3.3.5 Out-of-cycle Changes or Closeouts**

A close-out rating is given at the time an employee leaves IBM to go on Leave of Absence or approved extended absences for health or disability reasons and is not expected to return to work by year end. This assessment should be based on the assessment period, which ends the day before going on LOA.

A close out PBC is not given for employees who are retiring, separating under resource actions, or voluntarily leaving IBM.

All other regular active employees should have a single year-end PBC (with an assessment end date between October 1 and December 31) that takes into account their full year contributions, including any job changes. Those who change jobs prior to October 1 will be rated by their current manager, with input from the previous manager. Those who change jobs October 1 or later will be rated by their previous manager at the same time the year-end ratings are done for all other employees to ensure that the rating reflects relative contribution in the organization in which the employee worked for most of the year. The previous manager should also discuss the final rating decision with the receiving manager.

#### **3.4 Feedback - Informal Guidance and Interim Review**

You will participate in an assessment of your results at the end of the year; however, you need not wait to obtain feedback on how well you are meeting your commitments. You should take advantage of opportunities to ask for informal feedback during the year from the most appropriate sources - your manager, team leader, colleagues, clients, etc.

A-728

In addition, you may request an interim review with your manager at a relevant time during the year to discuss your progress or to adjust your objectives, if appropriate. Your manager may also suggest an interim review.

No rating is assigned at an interim review.

## **4. Goal-setting Guidelines**

Below is additional information about setting business goals, development goals, and people management goals (where applicable).

### **4.1 Business Goals**

You are responsible for writing a set of personal business goals that align with IBM's overall business goals and core values.

You should work with your manager to mutually agree on a set of goals that is appropriate for your position and level of responsibility. Since your performance will be evaluated based on your contribution, you should set goals that focus you on the most significant contributions you can make.

See section 3.1.1 "Goal Alignment" for more information on how your goals should align with IBM's overall business goals and core values. Also see "How Do I Write My Business Goals?" within the PBC web application help text for examples.

### **4.2 Development Goals**

IBM relies on its employees to continue to grow to meet the ever-increasing challenges of the marketplace. That is why it is important for each employee to identify the ways that he or she can improve to meet his or her business goals.

In the development goals section of the PBC application, you need to identify and document one or two development goals. Including development goals within your PBC does not replace your Individual Development Plan (IDP) but rather supports it. The IDP provides you an opportunity to document your career aspirations, near-term goals, skills and development needs that support your goals in your current job assignment and your future aspirations, as well as learning activities with planned completion dates.

The development goals you include in your PBC should also be reflected in your IDP under "Near term goals that address your current job assignments". It is important that you document goals and not just activities. Development activities should be first discussed with your manager and then documented in the Individual Development Plan or other development process available to you.

See "How Do I Write Development Goals?" within the PBC web application help text for examples.

### **4.3 People Management Goals**

If you have people management responsibilities, along with your business goals you need to write two to four goals related specifically to your role as manager. Managers have this additional goal-setting requirement because IBM understands that good people management is vital to the company's success and its ability to maintain a high-performance workforce.

Managers goals should be focused on how they will demonstrate the following behaviors of excellent people managers:

- Ensure employees understand how their work contributes to IBM's strategy, market success and your organization's goals
- Lead by example, setting clear performance standards, provide straightforward feedback in a respectful way, and actively manage low contributors
- Recognize outstanding contributions by employees and teams
- Ensure a positive, high-performance climate; listen to employees, address their issues and help employees succeed in IBM's matrixed environment
- Foster teamwork and inclusion among all employees -- across locations, cultures and geos -- and promote IBM's value of diversity
- Encourage employees to be innovative; support risk-taking and good ideas
- Develop the people with whom you work; teach and coach, and continually set clear development plans and goals for every employee reporting to you

See "How Do I Write People Management Goals?" within the PBC web application help text for examples.



## 5. Roles and Responsibilities

The PBC program is the foundation of IBM's performance management system, so it's important that all employees and managers understand and follow through on their PBC-related roles and responsibilities. By fully participating in the PBC process, you'll help IBM build and maintain the best workforce in the world and ensure that every employee is fairly recognized and rewarded for his or her performance each year. Participation of the PBC program is a condition for continued employment for regular employees at IBM.

All employees are expected to:

- Have your business goals and development goals in place by March 31.
- Your final goals are subject to your manager's input and approval.
- Seek informal feedback on your performance throughout the Year.
- Document your final results.

All people managers are expected to:

- Have your people management goals in place by March 31, and document your final results at the end of the year.
- Communicate IBM's annual business goals, as well as your unit and department goals, to all your employees.
- Assist employees with their goal setting and approve/modify their goals as necessary.
- Provide ongoing feedback, guidance, and counsel to employees.
- Ensure that your employees' final documented results are accurate.
- Determine and communicate each employee's overall assessment and rating.
- Discuss plans for expected improvement with your employees, as needed.

Reviewing managers (second line managers and above) are expected to:

- Implement the PBC program.
- Ensure fair and equitable administration of the PBC process across the organization.
- Review employee goals to ensure alignment with IBM's business goals and values.
- Review overall assessments and ratings.

A-732

**6. Contact Information**

For additional information, contact the Employee Service Center at 1-800-796-9876 or via email at the following address: [askhr@us.ibm.com](mailto:askhr@us.ibm.com)